

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

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 188 /2004
Case Heard: 27/01/2006

Date delivered: 24/02/2006

In the matter:

THE STATE

versus

JW TUME & 25 others

Coram: Kgomo JP et Musi J

JUDGMENT ON REVIEW

MUSI J:

- [1] These matters were sent on special review by the Chief Magistrate Kimberley on account of the fact that Mr Tiro Monchonyane who appeared on behalf of the accused between 12 March and 18 June 2004 in the Kimberley magistrate's court did not have a right of appearance. Monchonyane was attached to the Legal Aid Board Justice Centre: Kimberley.

- [2] Twenty six matters were referred. In 22 of the matters the accused have been convicted and sentenced. In four thereof, the accused have already been convicted but not yet sentenced.

- [3] Pursuant to the aforementioned referral Kgomo JP, Williams J concurring, issued a directive and order on 21 July 2004 to the effect that all the accused that were not sentenced to wholly suspended sentences be released or discontinue their

correctional supervision or community service or payment of compensation or fines or deferred fines, as the case may be, pending the determination of their respective cases.

- [4] Kgomo JP also requested Monchonyane and his principal, Mr Jooste, to explain the circumstances which gave rise to the series of events. Monchonyane is no longer attached to the Legal Aid Board and his whereabouts are unknown. He did not explain the sequence of events that led to this unfortunate state of affairs. Jooste supplied an affidavit wherein he sets same out, comprehensively and clearly. It reads as follows:

“Ek die ondergetekende,

Louis Fourie Jooste,

Verklaar hiermee onder eed soos volg:

1. *Ek is ’n meederjarige man wat vir eie rekening praktiseer as prokureur te 36 Leeuwenhoflaan, Kimberley.*
2. *Ek is versoek om die omstandighede rakende Mnr T Monchonyane se verskyning in die Landroshof te Kimberley terwyl hy nie gemagtig was om dit te doen nie te verduidelik.*
3. *Ek was die hoof van die Kimberley Regssentrum vanaf 1 Julie 2003 tot 31 Julie 2004 en dus ook die prinsipaal van die kandidaat prokureurs by die sentrum.*
4. *Ek kan nie die presiese datum onthou nie, maar Mnr Monchonyane het by die Kimberley Regssentrum begin werk as kandidaat prokureur aan die begin van 2003.*
5. *Ten einde as kandidaat prokureur te werk moes Mnr Monchonyane met my, wie sy prinsipaal was, ’n leerkontrak sluit, welke kontrak dan by die Wetsgenoodskap Kaap Die Goeie Hoop geregistreer moes word.*
6. *Indien die Wetsgenoodskap tevrede was met die dokumente, registreer hulle die kontrak teen die voorgeskrewe fooi waarna die kandidaat prokureur dan die bevoegdheid kry om in die landroshof te verskyn.*
7. *Op ongeveer 12 Februarie 2004 het ek die leerkontrak met Mnr Monchonyane gesluit. Op daardie stadium was dit gebruik dat die kandidaat prokureur uit eie fondse die registrasie fooi aan die Wetsgenoodskap betaal.*
8. *Ek het R200 uit die kleinkas geneem en aan Mnr Monchonyane geleen aangesien hy nie sy eie fondse gehad het nie. Hy moes met die R200 ’n posorder ten gunste van die Wetsgenoodskap koop sodat sy kontrak geregistreer kon word.*
9. *Ek kan nie die presiese datum onthou nie, maar dit moes ’n dag of twee voor die 12de Maart 2004 gewees het toe Mnr Monchonyane na my kantoor gekom het en my meegedeel het dat sy kontrak geregistreer was.*
10. *Ek het geen rede gehad om hom nie te glo nie en het vir hom ook*

versoek om die brief van die Wetsgenoodskap aan die kantoor bestuurder te gee vir liasering.

11. *Mnr Monchonyane het daarna met groot selfvertroue en entoesiasme in die Landroshof verskyn.*
12. *Op ongeveer 17 Junie 2004 het ek vermoed dat alles nie pluis is nie toe ek toevallig by die faksmasjien was en 'n faks van die Universiteit van Noord-Wes gerig aan Mnr Monchonyane gelees het.*
13. *Die faks was 'n geskiktheidsertifikaat van die universiteit wat deur die Wetsgenoodskap benodig word alvorens 'n leerkontrak geregistreer word.*
14. *Ek het die Wetsgenoodskap gebel en vasgestel dat Mnr Monchonyane se kontrak nog nie geregistreer was nie en dat hulle sy kontrak eers ongeveer die middel van Mei 2004 ontvang het.*
15. *Ek het Monchonyane gekonfronteer en hy het toe erken dat die kontrak nie geregistreer was nie en dat hy dit nie gedurende Februarie 2004 na die Wetsgenoodskap gestuur het nie. Hy het ook erken dat hy nie 'n posorder met die R200 gekoop het nie, maar die geld vir himself geneem het. (Mnr Monchonyane het intussen die R200 wat aan hom geleen was aan die Regssentrum terug betaal.)*
16. *Hy het erken dat hy nie in staat was om weer R200 te bekom nie en het my bedrieg sodat ek nie kon uitvind van die diefstal nie.*
17. *Ek het toe onmiddelik vir Mnr Bezuidenhout by die Kimberley Landroshof mondelings in kennis gestel en op 23 Junie 2004 skriftelik van die feit dat Mnr Monchonyane sonder magtiging verskyn het.*
18. *Ek het Mnr Monchonyane dadelik ook verbied om weer in die hof te verskyn en is hy ook geskors. Ek het later uitgevind dat Mnr Monchonyane bedank het en nie meer in diens van die Regshulpraad is nie."*

[5] Ms Caron Jeaven, the Legal Officer of the Cape Law Society, confirmed that Monchonyane's contract of articles of clerkship was only registered on 24 June 2004 and that a certificate of right of appearance was simultaneously issued therewith.

[6] In terms of the Attorney's Act 53 of 1979, (the Act) any person – other than those exempted by section 2A of the Act – intending to be admitted as an attorney must serve under articles of clerkship.

The academic requirements as well as the duration of the articles of clerkship are stipulated in section 2¹ of the Act.

¹Section 2(1) of the Attorney's Act 53 of 1979.

1. Section 2 of the Act reads as follows:

“Any person intending to be admitted as an attorney, shall serve under articles of clerkship for a period of –

 - a) two years after he or she has satisfied all the requirements for the degree of baccalaureus legum of any university in the Republic after pursuing for that degree a course of study of not less than four years;
 - aA) two years after he or she has satisfied all the requirements for the degree of bachelor other than the degree of baccalaureus legume, of any university in the Republic or after he or she has been admitted to the status of any such degree by any such university and has satisfied all the requirements for the degree of baccalaureus legume of any such university after completing a period of study for such degrees of not less than five years in the aggregate;
 - aB) two years after he has satisfied all the requirements for a degree or degrees of a university in a country which may be designated by the Minister, after consultation with the presidents of the various societies, by notice in the Gazette, and in respect of which a university in the Republic with a faculty of law has certified that the syllabus of instruction and the standard of training thereof, together with a supplementary examination (if any) required by the latter university, the requirements of which have been satisfied by that person, are equivalent or superior to those required for the degree referred to in paragraph (a);
 - b)
 - c) three years after he or she has satisfied all the requirements for any degree, other than an honorary degree, of any university in the Republic, but has not satisfied the requirements of paragraph (a), (aA) or (aB);
 - cA) three years after he or she has satisfied all the requirements for any degree other than an honorary degree, or for other such degrees, of a university in a country designated under paragraph (aB), and in respect of which degree or degrees a university in the Republic has certified that the syllabus of instruction and the standard of training thereof are equivalent or superior to those required for a corresponding degree of such university in the Republic, but has not satisfied the requirements of paragraph (a), (aA), (aB), or (c);
 - d) three years after he has passed the matriculation examination conducted and controlled by the joint matriculation board referred to in section 15 of the Universities Act, 1955, or an examination certified by that matriculation board to be equivalent or superior thereto, and thereafter has served continuously for a period of at least two years as a clerk to any judge of the Supreme Court, provided he enters into articles of clerkship within a period of one year after he has ceased to serve in such manner; or
 - e) five years after he has passed an examination referred to in par (d).”

Section 4 stipulates the information that has to be furnished to the secretary of the society of the province in which articles of clerkship is to be performed².

- [7] Section 5 of the Act provides for the lodging, examination and registration of articles or contract of service. In terms of this section it is the principal's duty to lodge the contract of service or articles of clerkship with the secretary of the Law Society³. Mr Jooste abdicated his duty. He was found guilty of unprofessional conduct by the Cape Law Society and according to the Society an appropriate sentence (whatever that means) was imposed.

2. Section 4 reads as follows:

“Any person intending to serve any attorney under articles of clerkship shall submit to the secretary of the society of the province in which the service under such articles is to be performed, the following, namely –

- (a) his birth certificate or other proof to the satisfaction of the society of his date of birth; and
- (b) proof to the satisfaction of the society that he is a fit and proper person and that he has –
 - (i) passed the examination referred to in section 2 (1) (d); or
 - (ii) satisfied all the requirements for a degree, other than an honorary degree, at any university in the Republic, or for a degree or degrees referred to in paragraph (aB) or (cA) of section 2 (1), in respect of which a certification in accordance with those respective paragraphs has been done.”

3. Section 5 reads as follows:

- “1. The original of any articles of clerkship or contract of service shall within two months of the date thereof be lodged by the principal concerned with the secretary of the society of the province in which the service under such articles or contract of service is to be performed.
- 2. The secretary of the society concerned shall, on payment of the fees prescribed under section 80, examine any articles or contract of service lodged with him and shall, if he is satisfied that the articles are or contract of service is in order and that the counsel has no objection to the registration thereof, on payment of the fees so prescribed register such articles or contract of service and shall advise the principal and candidate attorney concerned of such registration in writing by certified post.
- 3. If articles of clerkship are or a contract of service is not registered within two months of the date thereof, any service thereunder shall be deemed to commence on the date of registration thereof.”

[8] Section 8 of the Act provides for the appearance of candidate attorneys in court and before other institutions. The relevant portion thereof reads as follows:

- “ 1. Any candidate attorney who has satisfied all the requirements for the degree referred to in paragraph (a) of section 2(1), or for the degrees referred to in paragraph (aA) of that section, or for a degree or degrees referred to in paragraph (aB) of that section in respect of which a certification in accordance with that paragraph has been done, shall be entitled to appear in any court, other than any division of the Supreme Court, and before any board, tribunal or similar institution in or before which his or her principal is entitled to charge

the fees for such appearances as if he or she himself or herself had appeared...

2.

3. *The secretary or the society concerned shall, upon the written application of the principal of any candidate attorney referred to in subsection (1) and upon the payment of the fees prescribed under section 80 (bA), issue to such candidate attorney a certificate that he complies with the relevant provisions if subsection (1)."*

[9] It is clear that Monchonyane did not have the right of appearance in any court in the Republic of South Africa prior to 24 June 2004.

[10] It is trite that this Court has the power to review matters, which are not automatically reviewable, emanating from the lower courts (magistrates and regional) before and after sentence⁴.

[11] Monchonyane's appearance on behalf of the accused whilst he had no right to do so is an irregularity which is of such gross a nature as per se to vitiate the trial⁵. In *S v Lakay*⁶ a candidate attorney who had no right of appearance in the regional court appeared in that court. Van Zyl J came to the conclusion that:

4. See section 304 A and section 304 (4) of the Criminal Procedure Act, 51 of 1977 (CPA). This court may even do so prior to conviction in terms of section 24 (1) of the Supreme Court Act 59 of 1959 or by using its inherent review powers – see **S v Lusibi 1980 (1) SA 187 (T)** at **188 H to 189 A**.

5. See **S v Naidoo 1962 (4) SA 348 (A)** at **354 D - H**.

6. **1998 (1) SASV 91 (C)**. See also **S v Khan 1993 (2) SACR 118 (N)**.

“Sy optrede as regspraktisyn wat ‘n beskuldigde verdedig op ‘n uiters ernstige misdryf moet desnoods as ‘n growwe onreëlmatigheid beskou word. Die beskuldigde is kennelik daardeur benadeel en die reels van natuurlike geregtigheid asook oorwegings van behoorlike regspleging en openbare beleid verg dat die verrigtinge tot niet gemaak word. Kyk **S v Mkhise; S v Mosia; S v Jones; S v Le Roux 1988 (2) SA 868 A** op **872 G**”⁷.

I agree with Van Zyl R. Although both Lakay and Khan (supra)

dealt with candidate attorneys who had a right of appearance in the district courts but not in the regional courts the conclusion reached in both cases are, in my view, equally applicable to situations such as the cases under consideration. The right of appearance in the district court is equally essential to the proper administration of justice. The lack thereof means that the accused did not enjoy competent legal representation.

- [12] In my view we should not even consider the merits of each case in an attempt to discern whether the accused enjoyed adequate or competent representation. The futility of such an inquiry was aptly illustrated by **Kumleben AJA** (as he then was) in **S v Mkhise; S v Mosia; S v Jones; S v Le Roux** where he inter alia said:

*“Thirdly it would be wholly impracticable to attempt to determine ex post facto (that is, at some later stage when the irregularity come to light) whether counsel concerned was “a fit and proper person” in the sense that this term is applied and understood in the Act, i.e. whether he is generally a person of integrity and reliability ... If, on the other hand, these words are taken to refer to his competence in the actual conduct of the case the difficulty is, if anything, compounded. It would be even more impracticable, if not impossible, for the court to attempt to determine, by applying some norm of competence (and by way of an enquiry into the merits of the case and counsel’s conduct thereof) whether he in his defence of the accused has been proficient.”*⁸

7. at 93 e - f

8. 1988 (2) SA 868 (AD) at 875 C - E.

This argument also holds true even in cases where the accused has pleaded guilty. A competent legal representative could, for instance, have advised the accused to plead not guilty because the accused has a genuine defence. This speculative probability militates against confirming a conviction based on the assistance and advice of an incompetent person.

- [13] In the matter of *S v Anna Hugo*, case number B2755/04, which was erroneously sent on automatic review in terms of section

302 (1) of the Criminal Procedure Act, 51 of 1977 (CPA), our brother Majiedt J certified that the proceedings were in accordance with justice. The aforementioned certificate falls to be withdrawn for two reasons, firstly, the case was not reviewable in terms of section 302 (1) of the CPA because the accused had a legal representative⁹ (albeit an incompetent one – as subsequently discovered) and, secondly, had Majiedt J known that the legal representative had no right of appearance he would not have granted the certificate. We are entitled to withdraw the certificate without referring the case back to Majiedt J. See **S v Nkosi (1); S v Nkosi (2); S v Mchunu 1984 (4) SA 94 (TPD) at 100 D - 101 C; S v Zwane 2004 (2) SACR 291 (N) at 295 d - g.**

9. See section 302(3) (a) which states that the provisions of section 302 (1) shall only apply -with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal advisor.

[14] On 26 February 2002 Kgomo JP issued a directive to all legal representatives and magistrates in the Northern Cape wherein he inter alia stated:

“Graag word bygevoeg dat dit die plig van regsverteenwoordigers wat wildvreemd is om die voorsittendebeampte tevrede te stel dat hy/sy ‘n toegelate advokaat/prokureur is of dat die persoon verskyningsbevoegdheid het. Baie berigte verskyn in die pers van mense wat hulle as regsteenwoordigers voordoen...”

Presiding Officers should, generally, request legal representatives who are unknown to them or whose legal professional title they doubt to prove that they have the right of appearance in that particular court.

[15] **In the result the following order is made:**

a) The conviction and sentence in respect of each accused are set aside in the following cases:

- i) S v Jerry William Tume; Case no. B3576/04.**
- ii) S v Chisto Kruger; Case no. B2381/04.**
- iii) S v Michael Kopeledi; Case no. B4314/04.**
- iv) S v Ernest Mpungose; Case no. B725/04.**
- v) S v Elvis Maseng; Case no. B1684/04.**
- vi) S v David Oliphant; Case no B3250/04.**
- vii) S v Samuel Aaron; Case no. B1114/04.**
- viii) S v Thapelo Mongale; Case no. B5949/04.**
- ix) S v Dick Cowboy Steenkamp; Case no.**

B3915/04.

- x) S v Benjamin Dirks; Case no. B4463/04.**
- xi) S v Tete Poppy Kwes; Case no. B2818/04.**
- xii) S v Martin Parker; Case no. B 11230/03**
- xiii) S v Eddie Abew and 3 others; Case no.**

B1026/04

- xiv) S v Robert Fisher; Case no. B7125/03**
- xv) S v Martin Tafita; Case no. B 2257/04.**
- xvi) S v Freddie September; Case no. B4141/04.**
- xvii) S v Partich Blom and 1 other; Case no.**

B12449/03

b) S v Anna Hugo; Case no. B2755/04.

i) The certificate issued by Majiedt J on 11 August 2004 is withdrawn.

ii) The conviction and sentence are set aside.

c) The convictions and sentences on all counts in respect of each accused are set aside in the following matters:

i) S v Stephanus Johan van Niekerk; Case no.

B4153/04

ii) S v Thapelo Mongale; Case no. B2246/04

iii) S v Neal Everson; Case no. B368/04

iv) S v Motlapi Mphirime; Case no. B12443/03

d) The conviction of each accused in the following matters is set aside.

i) S v Johannes Chabalala; Case no. B4259/04

ii) S v Kagisho Herbert Louw; Case no. B3298/04

iii) S v Johanna Elizabeth Bester; Case no.

B5745/04

iv) S v Petrus Ntlathi; Case no. B4299/04

- e) The clerk of the court, Kimberley, is requested to send a copy of this order to all the accused mentioned in paragraphs 15 a - c above.**

**C J MUSI
JUDGE
NORTHERN CAPE DIVISION**

I concur:

**F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

For the State: Adv A van Heerden
On behalf of: Director of Public Prosecutions, Kimberley

For the Applicants: Adv J Hendricks
On behalf of: Legal Aid Board