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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between

JABULANI MKHISE (Case No. 468/85) APPELLANT

and

THE STATE RESPONDENT

JOSHUA MOSIA (Case No. 469/85) APPELLANT

and

THE STATE RESPONDENT

JOHANNES JONES (Case No. 470/85) APPELLANT

and

THE STATE RESPONDENT

JAN ANDRIES LE ROUX (Case No. 43/86) APPELLANT

and

THE STATE RESPONDENT

CORAM: JANSSEN, JOUBERT, VILJOEN JJA
et BOSHOFF, KUMLEBEN AJJA

DATE HEARD: 20 MARCH 1987

DATE DELIVERED: 12 MAY 1987

JUDGMENT/.....

J U D G M E N T

KUMLEBEN, AJA:

These four appeals were heard together.

During the period from October 1983 to January 1984 at four separate criminal trials

in the Transvaal Provincial Division each appellant

was charged with murder and, in some cases, with

other offences as well. All were convicted on the

murder charges. In three instances, extenuating cir-

cumstances having been found to be present, sentences

of imprisonment were imposed. In the case of the

appellant Mkhise the death sentence was passed. He

however received a reprieve in terms of sec 326(1) of

the Criminal Procedure Act, 51 of 1977 ("the Code")

and/

and a sentence of twenty years' imprisonment was substituted.

The significant common feature of their trials was that each appellant was represented by pro Deo counsel in the person of Mr Sebastiaan Hendrik de Jager. At the time that he appeared on their behalf he had not been admitted to practise as an advocate in terms of either sec 3(1) or sec 5(1) of the Admission of Advocates Act, 74 of 1964 ("the Act") and, it follows, was not enrolled as an advocate. As a matter of fact he was never so admitted or enrolled. Sec 2(1) of the Act states that:

"After the commencement of this Act no person shall be admitted to practise

as/

as an advocate save in accordance with the provisions of this Act."

His appearance as counsel on each occasion was therefore unlawful and he moreover committed an offence. Sec 9(1), and the relevant portion of sec 9(3), of the Act are to the following effect:

"(1) No person who has not been or is not deemed to have been admitted to practise as an advocate in terms of any provision of this Act or whose name has been removed from the roll of advocates or who is subject to any order suspending him from practice as an advocate, shall in any manner, directly or indirectly, practise as an advocate or hold himself out as, or pretend to be, or make use of any name, title, addition or description implying or tending to induce the belief that he is, an advocate or is recognised by law as such.

(3) Any person who contravenes any provision of this section shall be guilty of an

offence/

offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding twelve months with or without the option of a fine, or to both such fine and such imprisonment,...."

De Jager, in order to practise as an advocate, became a member of the Society of Advocates of the Orange Free State by subterfuge. He pretended to be a certain Mr Jacobus Willem Pienaar. In his written application for membership to the Free State Bar he alleged (holding himself out to be Pienaar) that on 29 January 1982 he had been admitted, and was enrolled, as an advocate in what was then the South West Africa Division of the Supreme Court. Had this been the case, he would have been entitled to practise

as/

as an advocate throughout the Republic in terms of sec 6 of the Act. After serving his training period as a pupil and after having passed the necessary practical examination, he was admitted to membership of the Free State Bar and proceeded to practise as an advocate in that province. By the same deception he subsequently became a member of the Pretoria Bar. It was during his period of practice there that he acted for the four appellants in the Transvaal.

In the light of these facts each of the four appellants, during September and October 1985, applied to court for a special entry, recording this irregularity, in terms of sec 317(1) of the Code. In addition each sought condonation for not having done

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so within the time prescribed by that sub-section. The applications for a special entry came before court and were granted together with the necessary condonation.

Though all are not identically worded, each entry relies on the fact that de Jager acted for appellants at a time when he was not admitted to practise as an advocate in terms of the Act. Thus, in the case of appellant le Roux the special entry is recorded in these terms:

"Gedurende die verhoor is beskuldigde verteenwoordig deur ene Sebastiaan Hendrik de Jager, wat hom valslik voorgedoen het as advokaat Jacobus Willem Pienaar, terwyl hy nie ooreenkomstig die bepalings van die Wet op die Toelating van Advokate, nr. 74/1964, as advokaat van hierdie Agbare Hof toegelaat en gemagtig was om as sulks te praktiseer nie. Die verrigtinge was onreëlmatig."

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In addition to relying on the irregularity, each appellant referred to the manner in which de Jager conducted his defence, alleging that in various respects he had not acted competently. For instance, it was said by one or more of them that his consultations were perfunctory and inadequate and that he failed to take a note of the evidence.

When the fact of this irregular and improper conduct became known, the Minister of Justice appointed a Commission of Enquiry into the Appearance of Advocates in the Supreme Court of South Africa under the chairmanship of its sole member, the Hon. Mr Justice F S Smuts.

Two/

Two of the four questions, to which the commission was enjoined to give attention, bear upon the issues in this appeal. They are the circumstances in which de Jager purported to practise as an advocate of the Supreme Court; and "whether in the circumstances in question a miscarriage of justice took place in any particular case." These questions were the subject matter of the First Report of the Commission of Enquiry dated 12 July 1984.

In the course of discussing the first question, the Report furnished full details of de Jager's not so professional career. He was a student at Stellenbosch University where he obtained his BA (Law) degree in December 1975 and the LLB degree in December 1977. His academic record was unexceptional. His

marks/

marks in Evidence, Criminal Law and Criminal Procedure were above average. In August 1979 he enrolled for a short spell as a pupil at the Johannesburg Bar. On 26 October 1981 he was admitted as an advocate of the Supreme Court of Bophuthatswana. This, however, did not entitle him to practise as an advocate in the Republic of South Africa. Towards the end of 1981, for a period of about two months, he was a pupil at the Natal Bar.

In March 1982 he was appointed a prosecutor at Keetmanshoop, South West Africa. Since accommodation was in short supply a colleague, Jacobus Willem Pienaar, invited him to share his lodgings. After de Jager left Keetmanshoop, Pienaar's identity document, his LLB degree certificate and his certificate of admission

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as an advocate of the South West Africa Division of the Supreme Court could not be found. These documents were undoubtedly misappropriated by de Jager since it was from this time that he assumed the name of Pienaar. As such he was appointed a prosecutor in Vryheid, Natal.

On the strength of the aforementioned documents and posing as Pienaar, he was, as I have said, admitted as a member of the Society of Advocates of the Orange Free State and in due course to the Society of Advocates of the Transvaal.

The four appellants were not the only accused persons for whom he appeared as pro Deo counsel. During 1983 and 1984 he represented some twenty one accused persons in that capacity in the Orange Free State and the Transvaal, of whom eight were acquitted.

Each/

Each applicant for a special entry annexed to his papers the First Report of the Commission of Enquiry. The facts therein, to which I have referred, were relied upon by the applicants and accepted by respondent as correct. As a matter of fact, as appears from the Supplementary Report to the First Report, dated 7 November 1984, de Jager, after he had been arrested by the S.A. Police, gave evidence on oath before the Commission of Enquiry and acknowledged the correctness of the facts concerning him in the First Report. (The supplementary report was also included in the application papers.)

The question whether the irregularity resulted in a miscarriage of justice was discussed

fully/.....

fully in the First Report. The Chairman, however, considered it inappropriate to express any final view on the nature or effect of the irregularity and decided that this question should be left for decision by this court on appeal. For this purpose in the First Report provision was made for the appointment of pro Deo counsel to act for the accused and instructions were given, which facilitated their applying for a special entry and the prosecution of the appeals.

It is a well established principle that an irregularity in the conduct of a criminal trial may be of such an order as to amount per se to a failure of justice, which vitiates the trial. (I shall, for convenience, refer to an irregularity having such effect/

effect as a "fatal irregularity.") On the other hand, less serious and less fundamental irregularities do not necessarily have that effect. As Holmes JA said in The State v Naidoo 1962(4) S A 348 (A) at 354 D - F, in reference to such irregularities:

"Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as per se to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried in terms of sec. 370(c) of the Criminal Code. That was the position in Moodie's case, in which the irregularity of the deputy sheriff remaining closeted with the jury throughout their two hour deliberation was regarded as so gross as to vitiate the whole trial. On the other hand there are irregularities of a lesser nature (and happily even

these/.....

these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses."

In the former case the fact of the irregularity is all that matters. No further enquiry into the merits is called for. In the latter case, as indicated in the quoted passage, the evidence is to be examined and assessed by the court of appeal and it must

"decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt."

S v Tuge 1966(4) S A 565(A) at 568 B.

The facts in the well known case of The

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State v Moodie, 1961(4) S A 752(A) serve as a useful

illustration of what is regarded in law as a fatal

irregularity. In a jury trial of an accused charged

with murder - as pointed out in the quoted passage from

the Naidoo case - the deputy sheriff was present throughout

the deliberations of the jury on its verdict. He took

no part in the discussion and there was no suggestion

that any jurymen was influenced or inhibited by his

presence. Sec 143(2) of Act 56 of 1955, which was the.....

statutory provision applicable at that time, provided

that when the jury withdraws for the purpose of con-

sidering its verdict

"they shall be kept by an officer of the court
in some convenient private place apart by
themselves until the majority prescribed
in sec. 113 are agreed upon the verdict...."

It/

It was held at page 759 of the judgment that these provisions, enjoining privacy,

"are no mere formality. It is fundamental to the jury system that the members should have the fullest freedom of private discussion throughout their deliberations. The presence of an unauthorised officer of the Court for some two hours, in the small and crowded room in this case, strikes at the very root of that essential right of privacy. It was so gross a departure from established rules of procedure that it can be said that the appellant was not properly tried. In other words it was an irregularity of such a nature as to amount per se to a failure of justice."

In these appeals the question to be considered in the first place is whether the irregularity, with which we are concerned, is of the same order.

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As the decisions in our law on

the nature of an irregularity bear out, the enquiry in each case is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred. (Cf. *S v Mushimba en Andere*, 1977(2) S A 829(A) at 844H.)

In order to decide this question in these appeals it is necessary to examine the statutory requirements for the admission of an advocate to practise, the underlying reasons for such provisions and the role an advocate is called upon to fulfill in the administration of justice.

The/

The requirements for the admission of persons to practise as advocates are laid down in sec 3(1) of the Act, which reads as follows:

"Subject to the provisions of any other law, any division shall admit to practise and authorize to be enrolled as an advocate any person who upon application made by him satisfies the court -

- (a) that he is over the age of twenty-one years and is a fit and proper person to be so admitted and authorized;
- (b) that he is duly qualified;
- (c) that he is a South African citizen or that he has been lawfully admitted to the Republic for permanent residence therein and is ordinarily resident in the Republic;
- (d) 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 name has been removed from the roll of attorneys on his own application;"

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(The sub-section which follows states the circumstances in which a person is deemed to be duly qualified.) In his application to court, an applicant must confirm on oath that the requirements of sub sec 3(1) have been satisfied. Rule 3bis of the Uniform Rules of Court ensures that the application is given due publicity and that his qualifications and suitability to practise as an advocate come under careful scrutiny. Thus, in terms of this Rule, he is enjoined to "deliver to the registrar the original and a copy of all the documents in support of his application" (Rule 3bis (1)(b)); and to state on oath whether he had ever been struck off the roll of advocates or suspended from practice by the court. On receipt of the application, the registrar of the

division/

division concerned must inform the public of the hearing of the application by displaying an appropriate notice on the notice board of the court (Rule 3bis (2)). Notice of the application, with the supporting affidavit and copies of the relevant documents, is to be served on the Secretary of the Bar Council or the Society of Advocates of the division concerned (Rule 3bis (1)(c)).

It is a matter of common knowledge that the merits of the application, including the suitability of the applicant, are carefully considered by the Bar Council concerned.

Should there be grounds for objection, these are drawn to the attention of the court and may result in the application being opposed at the hearing. In that event, the court, after hearing evidence if necessary, decides/

decides on the merits of the application and in doing so

"(t)he Court's duty is first and foremost and at all times, to be satisfied in these matters that the applicant is a proper person to be allowed to practise and a person whose re-admission to the ranks involves no danger to the public and no danger to the good name of the profession."

Ex parte Knox 1962(1) S A 778(N) at 784 H. The grant or refusal of the application is a matter in the discretion of the court. (See Swain v Society of Advocates, Natal 1973(4) S A 784(A) at 786 H).

Thus the Act and the relevant Rule make it plain that admission to practise as an advocate is more than a formality. Though an applicant may be duly qualified and satisfy the other requirements for admission,

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his character and integrity are of cardinal importance.

These are matters in which the public, the profession

and the courts have a vital interest. The Rule does

all it can to ensure that any factors casting a doubt

upon whether an applicant is a "fit and proper person"

to be admitted are brought to light and investigated

fully.

Finally, it should be noted that, should

the application be granted, the applicant is required

to take the oath or make an affirmation in which he

swears or affirms:

"that I will truly and honestly demean
myself in the practice of advocate
according to the best of my knowledge
and ability, and further, that I will be
faithful to the Republic of South Africa."

Once/

Once admitted to practise, an advocate,
by virtue of his office, enjoys certain rights and
 privileges (for instance, qualified immunity for
 defamatory statements made in the course of a trial).

And his authority to act on behalf of an accused as

he deems fit is wide-ranging. (See R. v Matonsi

1958(2) S A 450(A) and R. v Baartman and Others

1960(3) S A 535(A) at 538 A.) In the former decision

at page 456 A - B Schreiner JA said :

"I have found no Roman Dutch or South
 African authority which supports the
 view that the accused in a criminal
 case can question his counsel's conduct
 of the trial and claim relief because
 counsel 'prevented' him from giving evi-
 dence. The opposite view was indicated
 in R. v Muruven, 1953(2) S A 779(N),
 though BROOME, J.P., refrained from

deciding/

deciding that the rule that the litigant is bound by what his representative does is entirely inflexible. Such Roman Dutch writers as I have consulted emphasise the importance and high status of the advocate and I see no reason to doubt that his authority over the conduct of the case which he had been instructed to fight on behalf of a client was quite as full as that of the English barrister (cf. Klopper v. van Rensburg, 1920 E.D.L. 239 at p. 242)."

And on the same page the following passage from Swinfen v Lord Chelmsford, 157 E.R. 1436 at 1449 (per Pollock C.B.)

is cited with approval:

"a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it - such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial."

The/

The aforementioned rights and privileges entail a corresponding duty. It is one owed by counsel not only to the accused he represents but primarily to the court, the standards of his profession and to the public. The proper administration of justice requires that he be a person of unquestionable honesty and integrity. Thus, as was pointed out in Ex parte Swain 1973(2) S A 427 (NPD) at 434 H:

"it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court."

Thus/

Thus the language of the Act and its provisions, considered in conjunction with the privileges, duties and responsibilities of an advocate, to which attention has been drawn, satisfy me that authority to practise in terms of the Act is essential to the proper administration of justice in a criminal case.

The three counsel appearing for the respondent (Mr de Beer in the Mkhise and le Roux appeals; Mr Pienaar in the Mosia appeal; and Mr Jonker in the Jones appeal) in their written heads of argument gave reasons in support of their conclusion that the irregularity was a fatal one. This remained their attitude during argument.

Nevertheless/

Nevertheless an alternative argument or approach was raised and debated, namely, that the fact that counsel is or is not "a fit and proper person" is a relevant factor to be taken into account in a particular case in deciding on the gravity of the irregularity.

This argument, one infers, arose from an illustration given, and commented on, in the First Report of the Commission of Enquiry. The hypothetical case put forward was that of a person, of flawless character and vast experience in criminal matters, who returns to the Bar and resumes practice but who inadvertently fails to have himself re-admitted as an advocate. The possibility of such a "hard case" arising cannot be discounted but the chances would appear to be extremely

remote./.....

remote. The present case appears to be the first of its sort ever to have come before court in the legal history of this country. But even if the likelihood were less remote, I do not consider this argument to be cogent for more than one reason.

Firstly, though couched in another form, this contention in essence relies upon the absence of any prejudice in a case such as the one postulated: for that reason it is said that the irregularity should not necessarily vitiate the trial. However, as the Moodie case confirms and illustrates, the presence or absence of prejudice in a particular case is not a relevant consideration in deciding in the first place on the fundamental significance of the irregularity. Secondly, when considerations of

public interest are paramount, hardship in a particular case, should it arise, is to be regretted but cannot be avoided. Thirdly, it would be wholly impracticable to attempt to determine ex post facto (that is, at some later stage when the irregularity comes to light) whether counsel concerned was "a fit and proper person" in the sense that this term is applied and understood in the Act, ie, whether he is generally a person of integrity and reliability.

(Cf. Kaplan v Incorporated Law Society, Transvaal 1981(2)

S A 762 (TPD) at 782 H - 783 H.) 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/

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.

In Cooper v. Findlay and Others (1):

1954(4) S A 697 (NPD) at 700 A - B, Broome JP stated that:

"It is quite clear that the provision for the admission of advocates is part and parcel of the provision for the better and more effectual administration of justice. The Act is obviously conceived in the public interest."

In my view, having regard to all the relevant considerations discussed above, it is in the public interest that the defence in a criminal trial be undertaken by a person who has been admitted to practise as an advocate

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in terms of the Act and the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceeding. (This, I should add, was the view taken in S v Masithela, 1986(3) S A 402 (OPD) at 404 H, the facts being that a layman was permitted to represent the accused in a criminal trial in the magistrate's court.)

In the result each of the appeals is allowed and the conviction and sentence in respect of each accused are set aside.

M E KUMLEBEN, AJA

JANSEN, JA	)	
	)	
JOUBERT, JA	)	CONCUR
	)	
VILJOEN, JA	)	
	)	
BOSHOFF, AJA	)	