



**IN THE HIGH COURT OF SOUTH AFRICA**

**{EASTERN CAPE DIVISION, MTHATHA}**

**CASE NO:CA2519/2024**

**BEFORE THE HONOURABLE MADAM MJALI J & RUSI J**

**MTHATHA ON THIS 25<sup>TH</sup> DAY OF MARCH 2025**

*In the matter between:-*

**BAVUYISE HOPEWELL MAMFENGU**

**APPLICANT**

**And**

**MAGISTRATE REGIONAL COURT, BIZANA**

**1<sup>ST</sup> RESPONDENT**

**THE NATIONAL DIRECTOR OF**

**2<sup>ND</sup> RESPONDENT**

**PUBLIC PROSECUTIONS**

**THE MINISTER OF JUSTICE AND CORRECTIONAL**

**3<sup>RD</sup> RESPONDENT**

**SERVICES**

**MAYIGQIZE SPRING NDALA**

**4<sup>TH</sup> RESPONDENT**



Having considered the documents filed of record and hearing **Advocate Hobbs**, for the Applicant:-

**IT IS ORDERED THAT:**

1. The proceedings in Case no: **RCB 09/2024, the State v Bavuyise Hopewell Mamfengu**, are set aside in their entirety and the conviction and sentence are set aside.
2. The matter is remitted to the Regional Court, Bizana too be heard de novo before a Regional Court Magistrate other than Mr Gxarisa.
3. The Registrar of this Court must ensure that copies of this judgment are forwarded to the relevant Legal Practice Council as well as the Office of the Director of Public Prosecutions for the possible investigation into the conduct of Mr Ndala and necessary action.
4. A copy of this judgment must be forwarded to the head of prison where the applicant is incarcerated for his immediate release following the setting aside of his conviction and sentence in this matter.

**BY THE ORDER OF COURT**

  
**REGISTRAR**





**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

**CASE NO: CA 2519/2024**

In the matter between:

**BAVUYISE HOPEWELL MAMFENGU**

**APPLICANT**

and

**MAGISTRATE REGIONAL COURT, BIZANA,**

**1<sup>ST</sup> RESPONDENT**

**THE NATIONAL DIERCTOR**

**OF PUBLIC PROSECUTIONS**

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**THE MINISTER OF JUSTICE AND**

**CORRECTIONAL SERVICES**

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**MAYIGQIZE SPRING NDALA**

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**REVIEW JUDGMENT**

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## MJALI J

1. The right to legal representation is a fundamental right and is key to a fair trial. Central to the right to legal representation is representation by a properly qualified legal representative with a right of appearance in the trial court. Otherwise, the proceedings are vitiated and cannot be said to be in accordance with justice and must consequently be set aside. In *S v Lusu*<sup>1</sup>, Plasket J (Froneman J concurring ) made the following comment at paragraph 11:

“The right to legal representation is a right that is central to the fairness of criminal trials. Kroon J, in *S v Manguanyana*, held that this right was an integral part of our legal system, and the cornerstone of a civilised system of justice”.

At paragraph 12 of the judgment the following appears:

“The purpose of the right to legal representation is explained as follows by Professor Steytler:

‘The right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common-law tradition, produces a just result. In an adversary system a court's decision rests primarily on the evidence and arguments advanced by the parties and the system is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision.

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<sup>1</sup>2005 (2) SACR 538 (EC)

Because effective participation requires legal knowledge and courtroom skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process”.

2. Sadly, what transpired in the trial of this matter is a far cry from the above dictum and has culminated in this review application wherein the applicant seeks an order setting aside the whole of the proceedings in the regional court Bizana, as well as an order that the proceedings commence de novo before another presiding officer.

### **THE FACTS**

3. The applicant was prosecuted in the regional court on a charge of rape of an 11-year-old girl. He initially pleaded not guilty to the charge but later changed his plea and pleaded guilty during the course of the trial. In his statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA), the applicant (contrary to the penile penetration alluded to in the complainant's evidence as well as in the indictment), admitted inserting his finger into the complainant's genitalia. He admitted further that, he changed his plea freely and voluntarily without any undue influence or duress. He also admitted that he was in his sober senses when he changed his plea. He stated further that he was warned of the applicable minimum sentence pertaining to the charge. Satisfied that he admitted all the elements of the offence, the regional magistrate convicted the applicant of rape on the basis of his plea and

sentenced him to life imprisonment, this being the prescribed minimum sentence for the charge that he was convicted of.

4. During trial he was represented by Mr Mayigqize Spring Ndala (Mr Ndala), an erstwhile candidate attorney under Madikizela & Co, Litha (F60282), whose contract of articles of clerkship which was for the period 20 July 2021 until 19 July 2023, had been terminated before it expired. It is not clear when Mr Ndala's contract was terminated. For reasons that follow, the date of termination of his contract of articles is immaterial. Even assuming that he was still a candidate attorney at the relevant time, he could not appear in the regional court without complying with certain requirements in terms of the Legal Practice Act 28 of 2014 (the Legal Practice Act).
5. The trial in the regional court commenced on 25 April 2023 and was finalised on 29 August 2023. At the very least on 29 August 2023, Mr Ndala was neither registered for articles nor an admitted attorney. As such, he had no right of appearance in any court, let alone in the regional court. His lack of appearance then formed the basis of the application for the review and setting aside of the proceedings in the regional court. There is no challenge to the correctness of the verdict. The only issue is the technical irregularity occasioned by Mr Ndala's lack of right of appearance at the time he represented the applicant.
6. This Court, consequently, must decide whether Mr Ndala's appearance rendered the entire proceedings in the regional court invalid and a nullity, or only that part of the proceedings in which he appeared after the expiry of his period of practical vocational training without being an admitted attorney was affected. If only part of the hearing was affected, the further question,

therefore, is whether it would be competent for the matter to continue, but with a new legal representative for the applicant. Furthermore, considering that the applicant was released on bail prior to the proceedings in the regional court, this Court must consider what his status would be if part or the entire proceedings in the regional court were to be set aside as invalid.

7. The application was not opposed by any of the respondents but we thought it prudent to seek the opinion of the Director of Public Prosecutions as well as that of Mr Ndala as the outcome of this review could impact on the future conduct of this matter as well as a possible referral of Mr Ndala's conduct to the Legal Practice Council as well as the Office of the Director of Public Prosecutions. In this regard we issued the following directive
  - 7.1. In the event of the conviction and sentence being set aside and the proceedings being ordered to start de novo, what are the DPP's plans regarding the hearing of this matter without delay?
  - 7.2. The applicant was on bail prior to his conviction, what are the DPP's views regarding the release of the applicant on bail and at what amount should bail be granted, if at all? What bail conditions would be appropriate?
  - 7.3. Mr Ndala must, in a substantive affidavit, state reasons why his conduct should not be reported to the Legal Practice Council.
8. In response to our query Mr Ndala who appears to be oblivious of the fact that he had no right of appearance from the very onset, sought to explain why he continued representing the applicant after his contract of articles had expired. He stated that he first represented the applicant in 2022 when his office received instructions from him to move an application for his release on bail.

After the applicant was released on bail he continued appearing for him in the district court during the postponements until his case was transferred to the regional court. At that time, he was still a candidate attorney and had already served twelve months of training. He laboured under the impression that he could appear in the regional court after serving twelve months of articles. Mr Nkubungu who was assigned to represent the applicant in the regional court became ill and he was the only one available to represent him.

9. He stated further that due to pressure from the applicant and the court, he represented the applicant in the regional court. At the time of the commencement of the trial, he was a candidate attorney in good standing. His period of articles ended before the matter was finalised. Although he was aware of his lack of right of appearance, he decided to continue with the matter to finality to assist the office rather than handing it over to Mr Nkubungu who was not well and would require transcripts before representing the applicant. Mr Ndala further pleaded with this Court to give him a second chance and not to refer the matter to the Legal Practice Council or the National Prosecuting Authority as that would in his view “be crushing a nut with a sledgehammer”. He still aspires to be an admitted legal practitioner.
10. We have been furnished with the helpful opinion of the Director of Public Prosecutions for which we are grateful. The thrust of the DPP’s views is that Mr Ndala’s appearance in the regional court without properly being qualified to do so constituted a fatal irregularity and that the whole proceedings should be set aside. Further to that, the DPP has taken a decision that once the proceedings are set aside, the applicant will be prosecuted de novo before another magistrate. The trial of the applicant will be prioritized, and his status

with regards to bail will have to be dealt with afresh following the setting aside of the proceedings in the regional court.

11. It is by now trite that fatal irregularity occurs when an accused is represented by someone who does not meet the requirements and has not been granted right of appearance in court. There are certain requirements to be met in all the different courts before one obtains a right of appearance. In the district courts, the minimum requirement is that one should be a registered candidate attorney. In terms of section 25(5)(a) of the Legal Practice Act, a candidate legal practitioner is entitled to appear in any court in the Republic of South Africa (not being a regional Court, a Division of the High Court, Supreme Court of Appeal or the Constitutional Court) and before any Board or Tribunal before which the principal is entitled to appear. Section 25(5)(b) of the same Act sets out certain requirements to be met before the candidate legal practitioner's appearance in the regional Court. Such requirements are, either practicing as an advocate for at least one year or having undergone one year of practical vocational training. In addition to that, an application for appearance in the regional court must be made in writing by the principal and be granted by the Legal Practice Council to qualify for such appearance.

12. In this matter, no application was made by Mr Ndala's Principal for him to be granted leave to appear in the regional court. He was therefore precluded from appearing in the regional court even if his contract of training was still extant at the commencement of the trial against the applicant. Even worse, when his period of vocational training expired, he had no right of audience as a legal representative in any court of law. As such, none of the requirements set out in section 25(5)(b) of the LPC Act were met by Mr Ndala. His

appearance on behalf of the applicant under such circumstances constituted a fatal irregularity sufficient to vitiate the proceedings in the regional court in their entirety<sup>2</sup>. Consequently, they must be set aside with an order to commence them afresh before another magistrate other than Mr Gxarisa who presided over the impugned proceedings.

13. Mr Ndala's conduct of masquerading as an attorney when he knew very well that the contrary was true at the time he represented the applicant deserves censure. Apart from being oblivious of the fact that more than 12 months of articles was required before one could appear in the regional court, Mr Ndala was fully aware that he was neither a candidate attorney nor an admitted attorney during the proceedings in this matter. As such he knew that he had no right of audience in any court of law as a legal representative. That much is very clear from his written submissions that he filed in response to this Court's directive. Even more concerning is the allegation in the applicant's affidavit that payments were made to Mr Ndala directly. By any standards, that is conduct that must be brought to the attention of the relevant authorities for possible investigation.

14. In the premises the following order is made:

14.1. The proceedings in **Case no: RCB 09/2024, the State v Bavuyise Hopewell Mamfengu**, are set aside in their entirety and the conviction and sentence are set aside

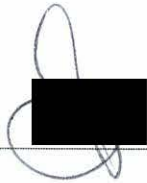
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<sup>2</sup>. *S v Heji & Others* 2007 (2) SACR 527, *S v Mkize* 1988 (2) SA 868 (A), *S v Khan* 1993 (2) SACR 118 (N), *S v Nkosi en Andere* 2000 (1) SACR 592 (T) and *S v Stevens en 'n Ander* 2003 (2) SACR 95 (T).

14.2. The matter is remitted to the regional Court, Bizana to be heard de novo before a Regional court magistrate other than Mr Gxarisa.

14.3. The Registrar of this Court must ensure that copies of this judgment are forwarded to the relevant Legal Practice Council as well as the Office of the Director of Public Prosecutions for the possible investigation into the conduct of Mr Ndala and necessary action.

14.4. A copy of this judgment must be forwarded to the head of prison where the applicant is incarcerated for his immediate release following the setting aside of his conviction and sentence in this matter.



**G.N.Z. MJALI**

**JUDGE OF THE HIGH COURT**

I agree.



**L. RUSI**

**JUDGE OF THE HIGH COURT**

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