

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO: 163/2012

In the review of:

THE STATE

and

SAMULE ZONIZI NGHONDZWENI

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 5 JULY 2012

[1] This is a special review upon request of the Judicial Head of the Sasolburg Magistrates Court in the matter between **THE STATE v SAMUEL ZONDIZI NGHONDZENI** which commenced on 4 August 2010 and is part heard in the Sasolburg Regional Court before Regional Magistrate S E Ebrahim.

[2] The review was requested when it transpired that Mr T M Marabo, who represented the accused during the said proceedings, did not have the right of appearance since June 2010. As appears from the letter of the Law Society of the Northern Provinces, Mr Marabo's Contract of Articles of Clerkship expired in June 2010

and he was not admitted as an attorney. There is no doubt, therefore, that Mr Marabo contravened section 8(4) (a) of the Attorneys Act, Act 53 of 1979, which reads:

“Any candidate attorney who is entitled to appear as contemplated in subsection (1), shall at the expiry of his articles or contract of service, and provided he remains in the employ of the attorney who was his principle immediately before such expiry, or provided he remains in the service of the law clinic or the Legal Aid board concerned, as the case may be, remain so entitled until he is admitted as an attorney, but not longer than six months.”

- [3] The accused, a senior member of the SAPS, was charged with assault, and rape. The charge of assault was subsequently withdrawn. He appeared in the Sasolburg Regional Court, represented by Mr Marabo who he gave instructions to act on his behalf or represent him on 14 April 2011. The charge was read to him on 13 June 2011 and Mr Marabo confirmed the plea of “not guilty” and entered no explanation. The complainant testified and was cross-examined by Mr Marabo before the proceedings were stopped for the time being, on 22 November 2011, to remit the

matter to this Court for this special review. No judgment has been rendered yet.

- [4] This Court consequently has to decide whether Mr Marabo's appearance rendered the entire proceedings in the court *a quo* invalid and a nullity, or only that part of the proceedings in which Mr Marabo appeared for the accused. 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 accused.

- [5] As stated in **Du Toit: Commentary on the Criminal Procedure Act** , Service 46, 2011, p. 11-27

“It is trite law that in principle a fatal irregularity (i.e. one that vitiates the proceedings) takes place where an accused is represented by someone who has no right of appearance.”

- [6] This was confirmed in **S v HEJI & OTHERS** 2007 (2) SACR 527 by Blignault J in a special review on 530 [10] and [11] with reference to a line of cases which dealt with the situation where a

candidate attorney appeared on behalf of the accused in the regional court, as *in casu*, without the right of appearance in terms of the Attorneys Act, Act 53 of 1979, and in which the Courts held that the proceedings were irregular and a nullity, *inter alia* **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).

- [7] In **S v CHUKWU & ANOTHER** 2010 (2) SACR 29 (GNP), on the other hand, it was found that not every irregularity vitiated the proceedings. In that case a candidate attorney continued to represent two accused after expiry of his certificate exhibiting his right to appear. Poswa, J, held that the candidate attorney's continued appearance was irregular but did not vitiate the proceedings. He decided that in the circumstances of that case there could be no miscarriage of justice if the proceedings were left intact and the case allowed to reach finality by permitting the representative to continue to represent the accused. But that was because the representative was indeed well enough qualified and experienced so as not to rob the accused of his Constitutional right to a fair trial which includes the right to be represented by a legal

practitioner.

- [8] The circumstances in **S v CHUKWU** are very different from the instant one in that there all the evidence had already been led, both sides had already closed their cases and the representative concerned appeared to be experienced. He had previously been admitted as an advocate and had the capacity and ability to conduct a criminal trial. Furthermore, the accused wanted him to continue to represent him. The court therefore held that to order otherwise would amount to technical adherence to formalism at the expense of the accused's right to be treated fairly.
- [9] When Mr Marabo was appointed by the accused on 13 April 2011, he already did not have the right to appear in the Regional Court or any other court in South Africa. Neither did he have such right on 8 September 2011 when the complainant started testifying. That in itself is undoubtedly an irregularity. It is clear, furthermore, from the record and from the Court's frequent interventions during Mr Marabo's cross-examination of the complainant, that Mr Marabo is neither qualified nor experienced enough to conduct the trial. The

accused, moreover, has indicated that he did not want him to continue to represent him either, but would prefer to instruct an attorney whom he could trust.

[10] In view of the circumstances of the present case, the Court would not be justified, therefore, in allowing the proceedings to continue, as was done in **S v CHUNGWU**.

[11] The remaining question, then, is whether the proceedings need to be set aside in their entirety, or only that part during which Mr Marabo appeared for the accused. In **S v DLAMINI EN 'N ANDER** 2008 (2) SACR 202 (T) it was found that the legal representative's lack of a right to appear during a portion of the trial still tainted the proceedings to the extent that they have to be set aside in their entirety and not just from the point at which he started to represent the accused to the point where his appearance was terminated. In my view, the same applies to the instant case and to my mind Mr Marabo's appearance without admission rendered the entire proceedings a nullity.

[11] There is no cogent reason why the entire trial should not be set aside at this stage and be heard afresh by the same court with a qualified legal representative for the accused.

ORDER

[12] In the premises the following order is made:

“The proceedings in Case no RC 72/10, The State v Samuel Sonizi Nghondzweni, are set aside in their entirety and the matter is remitted to the Sasalburg Regional Court to be heard afresh.”

H. MURRAY, AJ

I concur.

B. C. MOCUMIE, J

HM/eb