IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CA 75/03

In the matter between:

JACOB KEGAKILWE **APPELLANT**

and

THE STATE **RESPONDENT**

CRIMINAL APPEAL

MMABATHO

MOGOENG JP & LEEUW J

FOR THE APPELLANT : ADV M V TLHOMELANG
FOR THE RESPONDENT : ADV D MOEKETSI

DATE OF HEARING: 8 AUGUST 2003
DATE OF JUDGMENT : 26 SEPTEMBER 2003

REASONS FOR JUDGMENT

LEEUW J:

[1] The Appellant was arraigned and convicted of Attempted Rape at the Ganyesa Regional Court and sentenced to eight (8) years imprisonment. He appeared on his own during the trial at the Court ***a quo*** but was purportedly represented on Appeal by Advocate Tlhomelang, who had also prepared the Heads of Argument on behalf of the Appellant.

[2] At the hearing of the Appeal, this Honourable Court made the following order:

"THAT: There is no appearance on behalf of the Appellant.

THAT: THERE IS NO APPEAL BEFORE COURT.

THAT: MR TLHOMELANG IS NOT ENTITLED TO ANY FEE WHATSOEVER FOR ANY SERVICE HE HAS RENDERED TO THE APPELLANT FROM THE STAGE WHEN BAIL PENDING APPEAL WAS APPLIED FOR UP TO THIS STAGE AND ALL FEES ALREADY PAID TO HIM UP TO THIS STAGE MUST BE REFUNDED TO THE APPELLANT WITHIN 30 DAYS THROUGH THE REGISTRAR OF THIS COURT.

THAT: THE CONVICTION AND SENTENCE BE AND ARE HEREBY SET ASIDE AND THE APPELLANT IS TO BE RELEASED FROM PRISON WITH IMMEDIATE EFFECT.

WHAT FOLLOWS ARE THE REASONS THEREFOR.

[3] As already stated, Mr Tlhomelang is an advocate who was admitted in this Court on the 14th January 1999. He is not a member of any of the Constituent Bars.

[4] He accepted instructions directly from the Appellant, without the intervention of an instructing attorney, to represent him (Appellant) in a bail application pending an appeal instituted on his behalf by Advocate Tlhomelang. This is evident from the record of proceedings which indicate that:

(a) On the 10th May 2002, during the bail application on behalf of the Appellant, Advocate Tlhomelang placed his name on record and informed the Court that he has "been instructed by the Acc to note an Appeal;"

(b) He had filed with the Clerk of the Criminal Court, Ganyesa on the 18th April 2002, a "SPECIAL POWER TO APPEAL AGAINST CONVICTION AND SENTENCE" which is a power of attorney signed by the Appellant authorizing "Advocate M V Tlhomelang, Office No 623 Church Street, Vryburg, 8600 to be his Legal Representative and Agent, ..."

(c) The Notice of Appeal was prepared and signed by Advocate Tlhomelang himself, and the following appears at the bottom of the Notice of Appeal: "M V TLHOMELANG, COUNSEL OF APPELLANT, P O BOX 867, Vryburg, 8600. Ref: MV TLHOMELANG/APP/003/02."

(d) He prepared heads of argument on behalf of the Appellant and caused them to be served through attorney Moshe of Kuruman, and subsequently filed by the correspondent attorneys of Mafikeng on the 25th July 2003. I must here pause to mention that the Chief Clerk to the Director of Public Prosecutions addressed the Notice of Set Down dated the 26th May 2003, to Advocate Tlhomelang through the address and Reference number which appeared on his Notice of Appeal.

[5] The actions of Advocate Tlhomelang were professionally improper, as it is trite law and in actual fact settled that this is work normally performed by an attorney. See ***General Council of the Bar of South Africa v van der Spuy*** 1999 (1) SA 577 (T). ***De Freitas v Society of Advocates of Natal*** 2001 (3) SA 750 (SCA). The

actions of Advocate Tlhomelang were highly unethical and unprofessional to the extent that his appearance on behalf of the Appellant was irregular and consequently unlawful.

[6] The Court exercised its inherent powers of review and adjudicated over the matter as a Court of Review and relieved Advocate Tlhomelang of his duties as Counsel for the Appellant with the consequent order mentioned in paragraph 2 above. Although Advocate Tlhomelang is not a member of the Society of Advocates and therefore not bound and subject to the internal disciplinary procedures of this body, this decision will be referred to the North West Bar Association to enable them to consider taking appropriate steps against him.

[7] The Court enquired of Advocate Tlhomelang as to why he, being an advocate and an attorney, took instructions directly from a member of the public as he did? In response he said that he was trying to help a Black man since there were no Black Attorneys in Vryburg who could urgently act on behalf of his client. On the assumption, and without endorsing this thinking, that only Black Attorneys could help his client, the Court enquired why the Attorneys at Taung which is about 70 km from Vryburg could not help, Mr Tlhomelang had no response. The Court found no merit in the explanation advanced by Advocate Tlhomelang in an attempt to justify his conduct for doing work normally done by an attorney.

On the merits:

[8] It is alleged, on behalf of the State, that the Appellant attempted to Rape the Complainant, who is his daughter and who was nine (9) years old at the time when they shared a bed sometime during the night of March 1997, or during 1996. The date of the occurrence of this incident was in dispute.

[9] The attempted rape was reported to the Appellant's wife, who is also a mother to the Complainant, by the elder sister to the Complainant who alleged that she saw

bloodstains on the sheets used by the Appellant and the Complainant the following morning when she made up the bed.

[10] She made a report to the mother who took the child to hospital. She did not report the matter to the police, and neither did she confront the Appellant with the allegations. At the time of the incident the Appellant was separated from his wife but even when she informed him about the fact that she was filing for a divorce action against him, she did not disclose the attempted rape allegations.

[11] The Complainant's evidence did not shed any light on the bloodstains found on the sheets. Her evidence was to the effect that whilst she was sleeping at night in bed with the Appellant, she felt something being inserted in her private parts, she screamed and the Appellant was lying on top of her. During cross-examination by the Appellant, she stated that somebody was on top of her. From the record, there is a doubt as to whether the Complainant is certain as to who inserted what in her private parts, as well as the person who was lying on top of her. There is also evidence on record to the effect that prior to her sleeping in the same bed with the Appellant, she was screaming and having nightmares whilst sleeping in a separate room. This led to the Appellant inviting her to share a bed with him.

[12] Further doubt in favour of the Appellant, is created by the fact that the Appellant was not immediately confronted by either his wife or the daughter about the bloodstains found on the sheets and the allegations of an attempt to rape the Complainant. The Court relied on the evidence of the child and the mother. The medical evidence, which was handed in by consent, does not assist the State in that there are no signs of injury suggesting an attempt to penetrate the child's genitalia.

[13] It is for the above reasons that this Court found that the Court ***a quo*** misdirected itself in finding that the State had proved the case against the Appellant beyond a reasonable doubt and hence the order stated in paragraph 2 above.

M M LEEUW

JUDGE OF THE HIGH COURT

I agree.

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M T R MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT