IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

EASTERN CAPE DIVISION, BHISHO

Case no. 14/14

Review Case No. RCZ 300/13

Magistrate's Serial No. 6/2014

In the matter of:

THE STATE

versus

ANELE SWAPI **Accused No. 1**

UNATHI GANTILE **Accused No. 2**

JABU TIMAKWE **Accused No. 3**

SPECIAL REVIEW JUDGMENT

STRETCH J:

[1] The three accused are standing trial in the Zwelitsha regional court on a charge of robbery with aggravating circumstances.

[2] At the commencement of their trial on 17 March 2014, and up until this matter was sent on review, accused nos 1 and 2 were represented by Mr Manona, and accused no. 3 was represented by Mr T. Mafeke.

[3] All three accused pleaded not guilty and elected not to disclose the bases of their defences.

[4] The prosecution called three witnesses and was about to call a fourth it would seem, when it transpired that Mr Mafeke (for acc. no. 3) had not been admitted as an attorney.

[3] This was indeed confirmed in writing by the Cape Law Society. According to its records, Mr Mafeke's contract of articles of clerkship had been registered with one Mr Hole from Hole and Associates in East London. He commenced these articles on 4 April 2006 and they were terminated on 24 January 2008. Shortly thereafter, and on 28 February 2008, this firm of attorneys closed its doors.

[4] According to the Society's legal officer in charge of candidate attorneys, there is no record that Mr Mafeke applied for his admission as an attorney thereafter.

[5] The proceedings were accordingly stopped and the matter was sent on special review by the regional magistrate. At that time accused nos 1 and 2 were represented by Ms Mbadi, and Mr Mafeke had been substituted by Mr Diko.

[6] Section 8(4)(a) of the Attorneys Act 53 of 1979 ("the Act") reads as follows:

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

[9] Assuming that Mr Mafeke had satisfied the requirements of subsection 8(1) of the Act pertaining to the right to appear as a candidate attorney in the regional court, the right would have terminated when the firm of attorneys closed its doors (in his case on 28 February 2008), or at best for him six months later, at the end of August 2008. Once this right has been terminated, it only comes into operation again once the candidate attorney has been admitted as an attorney in terms of section 15 of the Act.

[10] In the circumstances, and in the absence of any indication that he had been so admitted, Mr Mafeke was not entitled to appear as an attorney at this trial which commenced more than six years after his articles had been terminated.

[11] The case law dealing with circumstances such as these is clear. As a matter of course, where an attorney represents a client when that attorney has no right of appearance, the proceedings are declared a nullity. This is so because the proceedings are deemed to have been irregular. It is thereafter up to the State to decide whether to proceed against the accused *de novo.* *S*ee for example *S v Mkhize; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 AD 875G; *S v Khan* 1993 (2) SACR 118 NPD 120e; *Oliver en 'n Ander v Prokureur-Generaal, KPA* 1995 (1) SA 455 KPA 463I-464I; *S v Gwantshu and Another* 1995 (2) SACR 384 (E) 386a; *S v La Kay* 1998 (1) SACR 91 (C) 93e-g; *S v Nkosi en Andere* 2000 (1) SACR 592 (T) 595g; *S v Stevens en 'n Ander* 2003 (2) SACR 95 TPA 97f; *S v Heji & others* 2007 (2) SACR 527 (C) [10] and [11]; *S v Nghondzweni* 2013 (1) SACR 272 FB 273 [5] and [6].

[12] The question which remains is whether the proceedings in the matter before me ought to be set aside in their entirety, or only those with respect to when Mr Mafeke appeared for accused no. 3.

[13] Accused no. 3 is not the only person on trial. He has two co-accused who have, on the face of it, been represented thus far by a qualified lawyer. In my view they have a direct and substantial interest in the future conduct of these proceedings. So too, does the prosecution.

[14] Accused no. 3 is presently represented by Diko Attorneys, who hold instructions from him that there should be a separation of trials with the proceedings carrying on where they left off against the first and second accused, and for the proceedings against accused no. 3 to commence *de novo* (obviously at the instance of the prosecution). This view is shared by his co-accused, by the presiding officer and by the senior public prosecutor.

[15] Indeed, the senior public prosecutor has informed me in writing that he has perused the transcript thus far, that the prosecution has examined the further evidence which it intends presenting, that he is of the view that it would be in the interests of justice for the trial of accused nos 1 and 2 to be separated from that of accused no. 3, and that once proceedings have been finalised against them, the prosecuting authority would be better equipped to consider whether to prosecute accused no. 3 afresh.

[16] Section 157(2) of the Criminal Procedure Act 51 of 1977 states that where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any such accused. It has also been held that a court may of its own accord raise the issue of separation of trials. See *S v Ndwandwe* 1970 (4) SA 502 (N). This appears to have been the position in the matter before me and which motivated the presiding officer to send the matter on special review.

[17] With the exception of *Gwantshu,* the cases which I have referred to all deal with the situation where there was either a single accused, or where the tainted legal representative had appeared for all the accused. By implication in those matters, the setting aside of the proceedings would automatically have called for the setting aside of the proceedings in their entirety.

[18] In *Gwantshu* however, as in the matter before me, the accused were represented by more than one lawyer. In that matter too, the State had called a number of witnesses before it had transpired that the lawyer representing the second of two accused did not have a right of appearance. The proceedings were stopped and the regional magistrate submitted the matter to this court for review, requesting that the proceedings be set aside to enable the affected accused to appoint another legal representative at a hearing *de novo*. This request was supported by the prosecutor and the representative for accused no. 1 (Mr Shaw), the suggestion having been that only the proceedings against accused no. 2 be set aside.

[19] Notwithstanding what appears to have been the intention of the magistrate, that of Mr Shaw and that of the prosecutor (that the proceedings against accused no. 1 ought to continue), and not having had sight of the record of the evidence adduced in the lower court, Mullins J (with Lang AJ) concurring, set aside the proceedings against both accused, concluding that:

(a) The mere fact of one attorney's lack of authority was sufficient to vitiate the proceedings as a whole even if it was intended that only the proceedings with respect to one of the accused should be set aside (at 386*a*);
(b) This was the effect of other judgments where there was a single accused only and the proceedings were set aside (at 386*b*) ;
(c) Without reference to the record, it was impossible to determine whether or not the irregularity might have had some effect on accused no. 1's defence (at 386*b*-*c*).

[20] *Gwantshu,* also having been the judgment of a review court (two judges) of this division, this court is bound to follow that decision, unless it can find that it is clearly wrong, and/or that it is distinguishable on the facts.

[21] As I have said, there are many cases where the entire trial of a single accused; alternatively, the entire trial of more than one accused represented by a single legal representative, have been set aside upon discovery that the representative has no right of appearance or has otherwise been disqualified to represent the accused. The reviewing court in *Gwantshu* concluded that the effect of these decisions is that the proceedings should be set aside as a matter of course, irrespective of the wishes of the affected parties, irrespective of what the record reflects, and irrespective of the indisputable fact that the situation where some of the accused are represented by qualified attorneys is distinguishable from that where all the accused are represented by the same disqualified attorney.

[22] It goes without saying that where a single accused is represented by a disqualified attorney, or where a number of accused are all represented by such an

attorney, and it has been decided that this irregularity is of such a nature that the proceedings are vitiated thereby, there can be no other way of dealing with the proceedings but to set them aside *in toto*, the obvious reason for this being that if the only person representing the accused is disqualified, the entire defence is affected. To my mind, the setting aside of a trial in these circumstances does not mean that trials where the circumstances differ should also be set aside entirely, particularly not where:

(a) The record does not call for such a course of conduct to be followed;

(b) The affected parties, inclusive of all the accused, the presiding official and the prosecutor do not deem such an approach to be necessary, convenient or in the interests of justice,

(c) It appears to be in the interests of justice to commence *de novo* against the affected accused only;

(d) A separation of trials together with appropriate measures is unlikely to prejudice the accused or the administration of justice.

[23] At the end of the day the main test in deciding whether the entire trial should start afresh (in other words without separating the affected accused from the others) is whether any of the accused will suffer prejudice, or are likely to suffer prejudice if this course of conduct is to be preferred. The views of the prosecution should also be thrown into the balance. Ideally, matters such as these should be dealt with on a case by case basis, and each matter should be considered on its own merits. To my mind, the court in *Gwantshu* applied a procedure (which had been followed in very different circumstances and which was the only option in those circumstances), to the circumstances of the matter which it was seized with, without giving any consideration to relevant factors such as the views of the parties and the nature and extent of the evidence already led.

[24] In my respectful view the reviewing court in *Gwantshu* not only erred in doing so, but it was clearly wrong in concluding that the <u>effect</u> (my underlining) of the setting

aside of one trial (in proceedings where that was inevitable due to the presence of a single accused) meant that entire trials in all other matters (where some of the accused were represented by qualified representatives) must be set aside as a matter of course. In my view the procedure followed in the line of cases preceding *Gwantshu* was not intended to have such a blanket effect.

[25] I have taken the opportunity to peruse the transcript of the proceedings in the court below. I agree with the senior public prosecutor that it is in the interests of justice that the trial of accused nos 1 and 2 be separated from that of accused no. 3.

[26] In the premises, and having found in any event that the court in *Gwantshu* was wrong in applying the procedures adopted in distinguishable cases without satisfying itself that the adoption of such procedure was in the interests of justice, I am not bound to follow that decision.

[27] I make the following order:

(a) The proceedings against Jabu Timakwe (accused no. 3) must be stopped, and any proposed hearing with him as an accused shall commence *de novo* and be held separately to the present proceedings.

(b) The present proceedings against Anele Swapi (accused no. 1) and Unathi Gantile (accused no. 2) shall continue and be finalised before the regional magistrate seized with this trial, provided that any questions which were asked by, and answers which were given in response to Mr T. Mafeke on behalf of Jabu Timakwe (accused no. 3), shall be ignored by the presiding officer and shall be expunged from the trial record before the proceedings continue.

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I T STRETCH **1 September 2015**
JUDGE OF THE HIGH COURT

I agree:

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C T S COSSIE
ACTING JUDGE OF THE HIGH COURT