

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

REPORTABLE: YES

CASE NO: 100/2022

REVIEW NO: 217706

CONSIDERED ON: 21/07/2022

DELIVERED: 26/07/2022

In the matter between:

THE STATE

and

MADODOMZI MDUTYANA

ACCUSED

REVIEW JUDGMENT

NOTYESI AJ

INTRODUCTION

[1] This matter came before this court by way of an automatic review from the District Court of Mt Ayliff. The accused was charged on one count of contravening the conditions of a domestic violence order. During his trial, he was unrepresented. He had pleaded guilty to the charge. His plea explanation in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 (“**the CPA**”) was rejected by the

Magistrate. The Magistrate convicted and sentenced him to a 2-year imprisonment without an option of a fine on 20 May 2022.

[2] The particulars of the charge against the accused were set out as follows:

‘The accused is guilty of the offence of contravening the provisions of section 7(1) read with section 17 of the Domestic Violence Act 116 of 1998 (“the Domestic Violence Act”).’

In that upon or about 13/04/2022 and at or near Bhetshwana in the District of Mt Ayliff, accused to wit Madodomzi Mdutyana did unlawfully and intentionally : contravene a prohibition, condition, obligation and/or order to wit entering complainants homestead by the name Gertrude Mdutyana whereas he was stopped from doing so, imposed on him in terms of a Protection Order to wit 242/2020 that was made and issued by the Magistrate of Mt Ayliff on the 13/11/2020 and duly served on him/her on the 13/11/2020.’

BRIEF FACTUAL MATRIX

[3] The accused first appeared before the District Court on 19 April 2022. He was unrepresented. He had been in custody. The record shows that he elected to conduct his own defence. The charge sheet has an attached prescribed form which contains rights about legal representation. The handwritten notes of the Magistrate regarding what transpired on the first court appearance is to this effect –

'The accused is before court and in custody. Elects to be in person. State is opposed to bail at this stage due to investigations. Case is postponed to 29 April for bail consideration. Accused remanded in custody.'

[4] On 29 April 2022, the case was again postponed due to lateness of hour to 6 May 2022. The handwritten notes of the magistrate state that the accused will be conducting his own defence. He was once again remanded in custody. On 6 May 2022, the case was further postponed to 11 May 2022. Again, on 11 May 2022, the case was postponed to 13 May 2022. On 13 May 2022, the case was again postponed to 20 May 2022. It was endorsed to proceed before another presiding officer. In each of these court postponements, there is no indication from the record that the accused was asked whether he had not changed his mind regarding legal representation. This court has found no record to suggest that the accused was informed about the seriousness of the offence, the benefits of legal representation and the availability of legal aid and its independence from the state. These are all crucial obligations for the court, especially, when dealing with an unrepresented accused person.

[5] At the commencement of the trial on 20 May 2022, the accused was still unrepresented. The prosecutor proceeded to put the charge to the accused. The magistrate asked the accused about his plea to the charge. Below are some of the questions by the court to the accused in this regard:

Court: Sir, when you first appeared and legal rights were explained to you, you indicated that you are conducting your own defence in the matter.

Accused: Yes, Your Worship.

Court: Did you understand the charge which has just been preferred against you?

Accused: That is correct. Your Worship.

Court: What is your plea?

Accused: I plead guilty Your Worship.

Prosecutor: The State accepts the plea, Your Worship, and makes an application that Court proceeds to establish from him the reasons why he is guilty so that he does not raise a valid defense, Your Worship.

[6] Subsequent to the plea of guilty, the prosecutor requested the court to ask questions from the accused to test the validity of his plea. Indeed, the court proceeded to question the accused. The records show that the magistrate had prior to questioning the accused, informed him that if he is not satisfied that his explanation does not amount to a plea of guilty, in the sense that he is not admitting all the elements of the offence, then a plea of not guilty would be entered on his behalf. The consequence would be that, once the plea of not guilty is entered, then the State would have to call witnesses to prove the case. In such an event, whatever admissions that the accused could have made during questioning would be entered in terms of section 220 of the CPA as formal admissions.

[7] It is timely to refer to some of the questions and answers that the magistrate had posed to the accused. I quote from the record:

Court: Do you know the person by the name of Gertrude?

Accused: Yes, Your Worship.

Court: What is she to you?

Accused: She is my mother.

Court: Did she at any stage apply for a protection order against you?

Accused: That is correct, Your Worship.

Court: Do you still recall when was that?

Accused: I am not – I do not remember quite well.

Court: Do you still recall what were the terms of the protection order?

Accused: Yes, I do.

Court: What was it?

Accused: I was told that I am not needed at home so I should stop going there. I was told not to come next to my mother because she can come to court and claim that I have done something to her if I did come next to her.

Court: Do you confirm that the said order you are talking about was issued here in Mt Ayliff court on 13 November 2020 and was served to you?

Accused: I do, Your Worship. I confirm.

Court: Now, on 13 April 2022, tell the Court what happened which led to you being arrested, briefly.

[8] The accused thereafter gave a narration of what had happened in relation to the case, and I deem it unnecessary to repeat. Importantly for purposes of this review, I extract the relevant questions and answers below:

Court: Do you admit that it was unlawful of you to enter those premises, knowing that there was a protection order ordering you not to enter?

Accused: I do. Your Worship, but I thought it was even a thing of the past.

Court: Do you admit that you intentionally contravened the protection order issued on 13 November 2020 by the Mt Ayliff Magistrate?

Accused: Not intentional.

Court: Yes, why do you say so?

Accused: I used to go at home, Your Worship and it was not my first time going there on that day and I was there for the whole week, and I was not going to stay for long. I was going to go up.

Court: Did the protection order issued against you allow you to enter the complainant's premises if you are going to enter them for a day or a week?

Accused: It does not, Your Worship.

[9] Pursuant to the questioning of the accused as set out above, the court rejected the accused's explanation and decided to accept the plea of guilty. He was thereafter found guilty of contravening the conditions of a domestic violence order. The court sentenced the accused after hearing submissions regarding mitigation of

sentence. He was sentenced to an effective term of 2 years without an option of a fine.

[10] During addresses regarding sentence, the prosecutor had handed to court two exhibits, the court order of 13 November 2020 and the record of previous convictions.

DISCUSSION

[11] The Constitution of the Republic of South Africa, 1996, provides in section 35(3) of the CPA that every accused person has the right to a fair trial. In **S v Zuma and Others**¹ the Court held:

“The right to a fair trial conferred by that provision is broader than the list of specific rights set out in parts (a) and (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was enquire “whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted”.’ A court of appeal is now enjoined to enquire

¹ 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401), para 16.

whether the trial was fair in accordance with notions of basic fairness and justice, or with the ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration”²

[12] The right to a fair trial includes the right to legal representation. The accused has a right to legal representation of his own choice or a legal representative at the expense of the state if he cannot afford his own. He must be informed of this right promptly. The record under review reveals an unsatisfactory state of affairs in this regard. On the first court appearance of the accused, the handwritten notes of the magistrate merely state:

“Accused is before court and in custody. Elects to be in person. State is opposed to bail at this stage due to investigations. Case is postponed to 29/04/2022 for bail consideration. Accused to remain in custody.”

[13] There is an annexure which is attached to the charge sheet marked A which is titled **RIGHTS WITH REGARD TO LEGAL REPRESENTATION**. It is not easy to infer from this form that the accused was adequately advised of his right to legal representation. It is the duty of the court to ensure that the accused fully understands the right to legal representation and to make an informed decision whether to seek legal representation or not. In **S v Cornelius and Another**³ the court confirmed the following:

“The exercise of the right to legal representation is of critical importance in any trial, as it is the only source through which the other rights can be effectively exercised.”

² See also S v Mosesi 2009 (2) SACR 31 at para 5.

³ 2008 (1) SACR 96 (C) at para 13.

[14] The accused in this case had appeared before court at least four times before the commencement of his trial on 20 May 2022. The court record merely states, “*sir, when you first appeared and legal rights were explained to you, you indicated that you are conducting your own defence in the matter*”. This statement does not pass muster in giving effect to the duty of the court to inform the accused adequately about his right to legal representation. In my view, the Magistrate was obliged to ensure that the accused fully understands the right to legal representation and the availability of legal aid in circumstances where he cannot afford his own legal representation. The Magistrate clearly fails to fulfil this duty.

[15] The court must not just pay lip service when explaining this very important right of legal representation. It is the duty of the court to ensure that the accused properly understands and makes informed decisions. The court is expected to encourage the accused to consider legal representation. In doing so, the court must even explain the seriousness of the offence and the possible sentence in the event of conviction so that the accused can make a well-informed decision. The court must warn the accused about the complicated nature of criminal trial and why it is important to be assisted by a legally qualified person. In certain circumstances, such as where the accused person is an unsophisticated person, as is the case in this matter, the court must clearly explain about the legal aid and the fact that legal aid lawyers are independent and not attached to the state prosecutors.

[16] The Magistrate cannot rely on what might have been said during the accused’s first court appearance. The case had been postponed more than three times before trial. The accused might have changed his mind, even if he had initially elected to conduct his own defence. That needed to be verified, considering that the

case had been postponed on numerous occasions, the accused is uneducated and lacks sophistications. The duties of the court in circumstances of this case were more compelling.

[17] In relation to legal representation of the accused, I conclude that the accused was inadequately informed of his rights and that was a failure of justice.

[18] The next aspect to consider is the manner in which section 112(1)(b) of the CPA was conducted; and the rejection of the accused's plea explanation in circumstances where the court had found the accused guilty. It is trite that the primary purpose of section 112 of the CPA is to protect an accused person, who, as in the instant case, is not only undefended but is clearly uneducated and exhibits no sophistications, from the adverse consequences of an illconsidered plea of guilty. In **S v Samuels**⁴ Dlodlo J, as he then was remarked:

“At the risk of repeating what I have stated earlier in this judgement, I reiterate that the questioning and answers must cover all the essential elements of the offence which the state in the absence of a plea of guilty will be required to prove.”

[19] In **S v Naidoo**⁵ the court remarked:

“It is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible

⁴ 2016 (2) SACR 298 para 21.

⁵ 1989 (2) SA 114 (A) at 121 F.

defence or leave room for a reasonable explanation other than the accused guilty, a plea of not guilty should be entered and the matter clarified by evidence.”

[20] It remains abundantly clear from the answers given by the accused, pursuant to the Magistrate’s questioning in terms of section 112 (1)(b) of the CPA, that the accused’s non-compliance with the order was not deliberate, mala fide or unreasonable. In the first place the accused disputed that his actions were unlawful, because he believed that the order was a matter of the past. Secondly, the accused disputed that he had an intention to violate the court order. He explained that he used to go to his home and that it was not his first day to be at his home. There is a further reason to infer that the accused was not acting in contempt of the court order because in his answers he gives a vague statement that ‘he was going to go up’ whatever that means. The court had a duty to interrogate these answers further.

[21] I had an opportunity to examine the court order of 13 November 2020. The court order merely states that, “*the court orders that the attached interim protection order be confirmed*”. The interim order does not form part of the records. During the proceedings, the prosecutor had informed the court that the interim protection order could not be found. There is no evidence that the interim protection order was ever served upon the accused person. There is no return of service which would have helped to explain whether the order was served upon the accused and that it was clearly explained to him. There is paucity of information regarding the order and the service of the order. These should be viewed against the answers given by the accused that he thought that this was a thing of the past. Secondly, the accused had suggested that he received the order on 13 November 2020. The order of 13

November 2020, which is part of these records states no more, than confirming an interim order which is not part of the record. All these questions should have been canvassed by the court with the accused and the state had a duty to prove its case beyond reasonable doubt.

[22] In my view the Magistrate having correctly found that the explanation given by the accused was not supportive of the plea of guilty, ought to have entered a plea of not guilty in terms of section 113 of the CPA. Section 113 of the CPA provides as follows:

“(1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.”

[23] Contempt of court has essential elements which must be proved beyond reasonable doubt just like any other crime. Contempt of court consists in unlawfully and intentionally violating the dignity, repute, or authority of a judicial body. An offence

is committed by a person who unlawfully and intentionally disobeys a court order. The state has an obligation to prove beyond reasonable doubt that the offence was committed intentionally with the necessary *mens rea*. The accused disputed the intention to commit the crime in this case and that his actions were unlawful. The Magistrate had no choice but to enter a plea of not guilty. The recent cases on contempt of court seem not to have changed the position set out in **Fakie NO v CCII Systems (Pty) Ltd.**⁶ Cameron JA (as he then was) stated the following at para 9:

“... A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

These requirements- that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt- accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute, or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.”

[24] The court must satisfy itself that not only that the accused committed the act but that he committed it unlawfully and with the necessary intention to do so. In this

⁶ 2006 (4) SA 326 (SCA) ([2006] ZASCA 54).

case, it can hardly be stated that the accused had acted unlawfully and with the intention in view of the answers that he had given in his plea explanation. He flatly denied the unlawfulness of his actions and the intention to commit an offence. I have no doubt in my mind that a plea of not guilty should have been entered on his behalf and the Magistrate has failed to do so. That was a failure of justice.

[25] Judicial Officers must ensure that proceedings are conducted in fairness. This duty becomes more onerous in circumstances where the accused is unrepresented. The accused throughout the trial must be assisted by the presiding officer. A criminal trial is not a game where the Magistrate fulfills the role of umpire. He must see to it that justice is not only done but must be seen to be done. In all the stages that I have outlined above gross irregularities had occurred. The first, is the failure to adequately inform the accused promptly about his constitutional right to legal representation before the trial and during the day of the trial. It is no cure for the Magistrate to suggest that the accused was previously advised of his rights in circumstances where the case had been postponed more than three times. Secondly, the accused had raised a valid defence in his plea explanation when he denied both the intention and unlawfulness of his actions. Thirdly, the charge was not established in the absence of the court order containing the terms for which the accused is alleged to have violated. Most importantly, there was no proof of service for the court order and the identity of the person that explained the court order to the accused.

[26] Another aspect of concern to this court is the delay in the processing of this review. The accused was convicted and sentenced on 20 May 2022. The Magistrate signed the record of review on 14 June 2022. That is close to a month. The record is relatively short. According to the registrar stamp, the record from the District Court

was only received on 18 July 2022. The matter was referred before this court 21 July 2022. During all this time, the accused was in custody in circumstances where his trial was grossly unfair and irregular. According to the record, accused's bail was never considered since April, the time of his arrest and detention. This is entirely an unsatisfactory state of affairs. These circumstances suggest a failing system and I find this to be unacceptable.

CONCLUSION

[27] For the reasons outlined above, I am satisfied that the proceedings were not in accordance with justice and have to be set aside. The circumstances of this case are regrettable and is not the best model on how criminal proceedings should be conducted by a judicial officer. In my view, this is a classical signal for the need of continuous judicial training as this might not be an isolated case. On this basis, I will direct that this judgement should be forwarded to the secretary of the Magistrate commission for the attention of Magistrates in general.

THE ORDER

1. The conviction and sentence against Madodomzi Mdutyana are set aside;

2. The head of prison wherever Madodomzi Mdutyana is serving sentence should release him immediately upon receipt of this judgement but no later than eight (8) hours from the time the order is received; and

3. The registrar of this court is directed to forward a copy of this judgment to the secretary of the Magistrate Commission to be circulated to all the Magistrate for training purposes and their attention.

M NOTYESI

JUDGE OF THE HIGH COURT (ACTING)

I agree

M JOLWANA

JUDGE OF THE HIGH COURT