THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 395/2018

In the matter between:

MZIWABANTU MADIBA MNCWENGI	**FIRST APPELLANT**
MZIMASI MADIBA MNCWENGI	**SECOND APPELLANT**
BUYELWA NOKWANDISA MNCWENGI	**THIRD APPELLANT**
LUMKO BAMBALAZA	**FOURTH APPELLANT**
XOLANI MAKAPELA	**FIFTH APPELLANT**
MAWANDE SIBOMA	**SIXTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Mncwengi & others v The State* (395/2018) [2019] ZASCA 135 (1 October 2019)

Coram: Petse DP, Saldulker, Van der Merwe and Nicholls JJA and Hughes AJA

Heard: 06 September 2019

Summary: Criminal law and procedure - assessor sitting in prolonged trial - assessor not unable to continue to act as such - trial court ruled in terms of s147 of the Criminal Procedure Act 51 of 1977 that trial continue before remaining members – ruling constituting procedural irregularity vitiating the proceedings – convictions and sentences

set aside.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Boqwana J sitting as court of first instance, with remaining assessor, Mr H Swart):

1. The appeals are upheld.
2. The convictions and sentences of all the appellants are set aside.
3. The registrar of this court is directed to send a copy of this judgment to the Magistrate's Commission and the Legal Practice Council.

JUDGMENT

Saldulker JA (Petse DP, Van der Merwe and Nicholls JJA and Hughes AJA concurring):

Introduction

[1] The six appellants were tried in the Western Cape Division of the High Court, Cape Town (the high court) on three counts of murder, four counts of kidnapping and one count of assault with the intent to commit grievous bodily harm, before Boqwana J and two assessors, Mr H Swart and Ms S Solomons, the latter being a practicing attorney. During a protracted trial, one of the assessors, Ms Solomons, failed to return to the trial. The trial then continued before the remaining members of the court to its conclusion. At the stage when Ms Solomons failed to return, the trial had run for seven months and 22 witnesses had already testified. On 19 November 2014, all the appellants were convicted on three counts of murder and kidnapping, and one count of assault with intent to do grievous bodily harm. On 24 March 2015, the high court

imposed various sentences, which culminated in an effective sentence of 18 years' imprisonment for each of the appellants.

[2] On 26 June 2015 the appellants applied for leave to appeal against their convictions and sentences. Apart from attacking their convictions and sentences on various grounds, the appellants also pertinently raised the issue whether the high court had committed a fatal irregularity by continuing the trial in the absence of one of the assessors, Ms Solomons. The applications for leave to appeal the convictions and sentences were refused, but leave to appeal was granted to this court on the limited issue formulated in the judgment of the high court in the following terms: 'whether the trial should have continued or started *de novo* upon one of the members of the court becoming unable to act as an assessor'.

[3] Accordingly, the crisp question for decision in this appeal is whether the continuation of the proceedings before the remaining members of the court was authorised in terms of s147(1) of the Criminal Procedure Act 51 of 1977 (the CPA). If this question is answered in the affirmative, the appeal must fail, but not so if the answer is in the negative. This issue must then be considered against the following factual backdrop.

Background

[4] On 14 August 2013, the appellants' trial commenced. On 17 March 2014, during a trial-within-a trial pertaining to the admissibility of certain warning statements, Boqwana J informed counsel for the defence and the State that she had received a medical certificate from a Dr P C Ndomile, stating that Ms Solomons had been booked off sick by him due to acute anxiety disorder from 17 to 19 March 2014. The trial was then adjourned to 24 March 2014. Prior to the court proceedings on 17 March 2014, Ms Solomons had informed Boqwana J that she had been offered a position to act as a magistrate in Upington. Ms Solomons requested that she be released from her obligations as an assessor in the trial. Boqwana J declined the request. The office of the registrar attempted to contact Ms Solomons for the duration of that week to ascertain

the nature of her illness and the period of her envisaged absence, but to no avail. [4]

[5] When the trial resumed on 24 March 2014, Ms Solomons did not attend court. At the behest of the trial judge, the registrar attempted to contact Ms Solomons on the telephone number she had provided, but this proved fruitless. An attempt was made to contact Ms Solomons at the Upington Magistrate's Court where it was suspected she might be, and where she was in fact found. Ms Solomons was then requested by the trial judge to submit a written explanation for her conduct. In response, Ms Solomons addressed a letter to the high court explaining her reasons for not returning. These were that the duration of the trial had far exceeded the allocated estimated time, and that this had severely compromised her financial position. She attributed her dire financial situation to the fact that her practice was not generating income because of her extended absence.

[6] It is necessary to refer to portions of the letter which underpinned Ms Solomons' reasons:

'Dear Judge and all the interested parties in the abovementioned matter. I hereby wish to request your permission to excuse me permanently from the abovementioned matter *S v Mncwengi and 6 others.* My reasons are as follows:

1. When I was informed about the duration of the matter it was communicated to me that the estimated period is six to eight weeks or a little bit longer. At that stage I did not foresee any delay in the matter or that the matter could probably run for this lengthy period. *I first was not aware that the matter would take more than six months on the Court's roll. In the interim I did [lose] money, clients and financially I am not doing well.*

I did alert the Honourable Judge NP Boqwana that I applied for other jobs and that I was accepted to act as Magistrate in the District Court in Upington. The Honourable Judge NP Boqwana and Assessor Mr Swart referred me to the provisions of the Criminal Procedure Act 51 of 1977 as amended pertaining to the circumstances and conditions under which an assessor could be excused from record.

I then attempted to make an appointment with the Judge President to discuss alternative ways or the possibility of me not forfeiting the position as magistrate (acting)

offered to me in Upington. I was advised that my request to the Honourable Judge President would be inappropriate. I then withdrew my planned appointment with the Judge President and was faced with my own decision.

I stressed and panicked. I had to think about my family (3 children plus 1 child, 4 children) *my financial difficulties as well as my future in the legal profession.* I did not make a decision in isolation of the rights of the other parties that is the State Prosecutor, the defence advocates, the accused and other parties involved in this matter.

My decision was based on the fact that there are cases in which only one assessor is sitting my wish is for the matter to proceed in my absence and the rights of the accused will not be affected because of my absence as the remaining assessor, Mr Swart is still there assisting the Judge on the aspect of facts.

I hereby wish to apologise for the manner in which I dealt with the situation as well as to plead to all the interested and relevant parties in this case to accept my reason and absence from the case *as I accepted and signed a contract to act as a magistrate in Upington*. S Solomons.' (My emphasis.)

[7] The aforegoing letter was brought to the attention of counsel for the defence and the State, and the matter was then postponed to 2 April 2014, for the hearing of argument from all the parties as to whether the provisions of s147 of the CPA were applicable. On the resumption of the trial, and after hearing argument, the matter was again postponed to 14 April 2014 so as to obtain further details from Ms Solomons with regard to her appointment as a magistrate in Upington. On 14 April 2014, Ms Solomons advised the high court in further correspondence that she had signed a contract on 17 March 2014 to act as a magistrate in Upington, and that, in the circumstances, she would not return to continue with the trial.

[8] The effect of Ms Solomons' absence from the trial in light of s147 of the CPA was argued extensively and the prevailing case law considered in the high court. After hearing submissions from both the defence and the State, the high court ruled that the provisions of s147 of the CPA were applicable. It then considered that the absence of Ms Solomons and her reasons for absenting herself from the trial rendered her unable

to continue with the trial as contemplated in s147 of the CPA. Thus, it directed that the trial proceed before the remaining members of the court. The high court's reasoning appear from the following passages in its judgment:

'[T]he most important principle stated by the court in the *Jeke* case which I find to be equally important to the present matter is that *where it is impossible to obtain or secure the assessor's presence the court may in the interest of justice direct the proceedings to continue before the remaining member or members of the court or direct that the proceedings start afresh. The Court found it would have been impossible to procure the presence of the assessor and furthermore, because the matter was almost at the end of the State's case. It would not have been in the interest of justice, which is the chief and overriding factors, to order that the trial start de novo.*

. . .

In the same manner the continued presence of Ms Solomons in this *trial would not have served the interest of justice and those of the accused as her commitment was questionable. Moreover, she departed not having been released by the Judge. It would not have served the interest of justice and the accused for Ms Solomons to be forced to sit in a trial in which she was not committed. I must stress that Ms Solomons was not released by this court due to her unwillingness to act as assessor or due to lack of interest rather, she advised having absconded that she could not come back citing financial distress arising from loss of clients, wrong estimation of the trial duration which had caused her stress and emotional distress and her appointment to act as a magistrate in Upington.*

. . .

my view is that the meaning of the word unable to act in section 147 of the Criminal Procedure Act should be interpreted to include inability to deliver justice to the accused. It must also be borne in mind that four of the accused persons had been in custody for just over two years awaiting finalisation of the trial. The *trial had been running for about seven months and the state was nearing the close of its case in the main trial* and the trial-within-a-trial had commenced when the assessor became absent. Witnesses had given extensive evidence some of whom individually testified for a number of days.' (My emphasis.)

[9] It is against the foregoing background that the issue raised in this appeal must be considered. In this exercise there are pertinent statutory provisions and previous decisions of this court that come to the fore.

Statutory framework

[10] Section 14(2) of the Superior Courts Act 10 of 2013 prescribes that a high court in criminal matters must be constituted in the manner prescribed in the applicable law. In the context of the facts of this case, the CPA is evidently the applicable law which regulates the conduct of criminal trials. It is necessary to emphasise that its provisions must be interpreted in a manner that promotes the "spirit, purport and objects" of the Bill of Rights. Because criminal proceedings must be conducted in a way that conduces to a fair trial, s35(3) of the Constitution of the Republic of South Africa, 1996 is of primary importance when interpreting the Criminal Procedure Act.[1]

[11] Section 145 of the CPA provides for the participation of assessors in a criminal trial. In terms of s145 a judge in the high court may hear a case with one or two assessors. Once appointed, an assessor becomes a member of the court. Before an assessor hears any evidence, he or she has to take an oath or make an affirmation, administered by the trial judge to give a true verdict upon the issues to be tried, on the evidence placed before him or her. It affirms the principle that an assessor who takes an oath or affirmation shall be a member of the court, and thus participate in all the decisions of the court.[2]

[12] The relevant statutory provisions that deal with an assessor's inability to act as an assessor are located in s147 of the CPA, which permit a trial to be continued in the absence of an assessor in certain specified circumstances. Section 147 reads:

'**Death or incapacity of assessor.**

(1) If an assessor dies or, in the opinion of the presiding judge, becomes *unable to act*

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[1] S v Jaipal [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) para 32. S v Zuma 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); 1995 (1) SACR 568.

[2] R v Price 1955 (1) SA 219 (A); [1955] 1 All SA 332 (A).

as assessor at any time during a trial, the presiding judge may direct –
(a) that the *trial proceed before the remaining member or members of the court; or*
(b) that the *trial start de novo*, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.' (My emphasis.)

Discussion

[13] The proper interpretation of s147 has been considered in several judicial dicta of this and other courts. More than two decades ago, this court had occasion to consider the meaning of the words 'unable to act' in s147 in two decisions, *S v Gqeba & others* 1989 (3) SA 712 (A); [1989] 2 All SA 425 (A) and *S v Malindi & others* 1990 (1) SA 962 (A); [1990] 4 All SA 433 (AD).

S v Gqeba

[14] In *Gqeba,* during the trial of 14 accused charged with murder, one of the assessors was discharged by the trial judge in terms of s147 of the CPA. The assessor had requested that he be released from his duties as an assessor in order for him to accompany his only daughter, who was suffering from advanced cancer, for medical treatment. Having considered that such a matter fell within the purview of s147, the assessor was discharged on humanitarian grounds, with the unanimous consent of the defence and the State. The trial continued before the judge and the remaining assessor. At the end of the trial, some of the accused were acquitted and six others were convicted and sentenced to death.

[15] On appeal, Grosskopf JA (writing for the majority), found that the desire of the assessor to be with his daughter was motivated by practical and emotional considerations. It was common cause that the concept 'unable to act' embraced both physical and mental disability. Nevertheless this court said that it seemed clear that the desire of an assessor to be discharged, however pressing his reasons might be, would not amount to an 'inability to act'. This court further noted that however understandable the attitude of the trial judge was, the discharge of the assessor was 'not based on any opinion regarding the [assessor's] ability or "bekwaamheid" to carry on his duties as an

assessor'. Rather, continued the learned judge, this was a case where the assessor was 'able' but 'unwilling to act'. The convictions and sentences were therefore set aside. In the dissenting judgment, Steyn JA found that the assessor became unable to act as such. In his view the assessor's emotional state and his daughter's condition were inseparably linked, and that the assessor was and would indefinitely have been unable to act as an assessor. He emphasised that the assessor's mind would be elsewhere, and his continued presence on the bench would have been physically and juridically useless (or even harmful).

[16] However all the judges in *Gqeba* were agreed that 'incapacity' in s147 demanded that a judge find that an assessor cannot proceed as such. The assessor's incapacity may be physical or mental, possibly as a result of extended or serious emotional stress. However, the assessor's mere wish, irrespective of how serious the motives may be does not constitute 'incapacity' within the meaning of the subsection.[3] Additionally, Grosskopf JA held with reference to the principles enunciated in *R v Price* 1955 (1) SA 219 (A) at 223D,[4] that, if in fact the court convicting the accused was not properly constituted, this was an irregularity that could not be waived. Grosskopf JA went further to say that the result reached may be regarded as unsatisfactory, but could not be avoided since the correct composition of the court was always a matter of importance.

S v Malindi

[17] In *Malindi,* the appellants were accused of treason; alternatively terrorism, subversion, murder and furthering the objects of an unlawful organisation. Approximately 17 months after the trial began, the trial judge made an order that one of the assessors had become unable to continue acting as an assessor in the case. He further directed that the trial continue with the remaining members. The accused

[3]In A Kruger Hiemstra's Criminal Procedure (Electronic version, 2019) at 21-12, the author states in the commentary that 'capacity or incapacity of the assessor must be determined objectively – one is not here concerned with perceptions . . . "[i]ncapacity" means an actual inability to fulfil functions, which inability can be attributed to an inherent physical or mental condition, or could possibly also refer to a situation in which the assessor is physically prevented from attending the trial. However, "incapacity" does not cover the situation where the assessor has simply lost interest. . .'.

[4]Prima facie when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal should take part in the decision. If the court is not properly constituted then its verdict and consequently its sentence are irregularities that cannot be waived by an accused person.

brought an application to have the trial quashed, *inter alia*, on the grounds that the trial judge erroneously acted in terms of s147(1) of the CPA, by ruling that the assessor was unable to act. Thus, so the argument went, the court was no longer properly constituted. On appeal, this court considered the meaning of the word 'unable to act' for the purpose of the power that s147(1) conferred on judges. Corbett CJ said the following:

'The word *"unable", in the context of s 147(1) conveys to my mind an actual inability to perform the function of acting as an assessor. Such an inability could derive from an inherent physical or mental condition or possibly also a situation which physically prevented the assessor from attending the trial, such as for example indefinite detention here or in a foreign country*. I do not think, however, that the word "unable" is appropriate to describe or comprehend the situation where an assessor becomes legally incompetent to continue to act in a case because of some act or occurrence which warrants his recusal. I am also doubtful whether the word "*onbekwaam*" even in the sense of *"ongeskik", is wide enough to comprehend such a situation; but even if it is, it seems to me, applying the principles enunciated in S v Moroney, that the ambit of s 147(1) should be restricted to what is common in the meaning of "unable" and "onbekwaam".'* (My emphasis.)

[18] Before us counsel for the State conceded that Ms Solomons had absconded. Nevertheless, he contended that her unwillingness to continue to act as an assessor fell within the purview of s147 of the CPA, in that she was unable to perform the functions of an assessor. In contrast, counsel for the appellants contended that s147 was not applicable. Simply put, it was argued by the appellants that Ms Solomons had absconded, and was unwilling to continue as an assessor. By doing so, she denied the appellants their right to have the evidence presented and considered by every member of the court, as constituted when the trial commenced. This concluded the argument, was a fatal irregularity which vitiated the trial.

[19] The Constitutional Court stressed the importance of the role of assessors in *S v Jaipal.* Their role lies in their participation in judicial decision-making based on their experience in the administration of justice or their skills in specific matters which may

have to be considered at the trial. Assessors have considerable power and play an important role in the functioning of, as well as the legitimacy of criminal courts. Their dignity, status and needs must be respected by all those who interact with them in the performance of their judicial duties. At the same time assessors must also be aware of the significance of their role and act accordingly, in terms of the law.

[20] As alluded to above, the crux of this matter is whether Ms Solomons, who having committed herself to act as an assessor in a criminal trial, and later found herself in a precarious financial position because the trial had become protracted, was 'unable' to continue as an assessor within the meaning of s147 of the CPA.

[21] Ms Solomons' ability or inability to continue to act as an assessor must be determined objectively. Having regard to the principles in *Malindi* and *Gqeba* there must be an actual inability to perform the functions of an assessor. This could be derived from an inherent physical impairment or a prolonged emotional upheaval (mental condition). There were no objective facts before the learned judge to suggest that Ms Solomons had become physically or mentally unable to continue to act as an assessor as propounded in *Gqeba* and *Malindi.* Ms Solomons freely elected to sign a contract of employment to act as a magistrate in another court whilst she was committed to act as an assessor in the high court. There was no expert evidence on the basis of which the learned judge could form an opinion that Ms Solomons had become physically or mentally unable to carry out her functions as an assessor.

[22] Ms Solomons' desire was that she be released from the trial because of the financial predicament she found herself in, due to the prolonged trial. To find that she was unable to act within the meaning of s147 because she had become financially impoverished, would be straining the language of the section beyond what is contemplated by the Legislature. There must be objectively sound reasons for an assessor to become 'unable to act'. In Ms Solomons' case her financial impoverishment cannot amount to an objective inability to act as an assessor in terms of s147 of the CPA. The ambit of the words 'unable to act' in s 147 does not envisage the case where

an assessor is unwilling to continue as an assessor due to financial hardship, as a result of a prolonged trial.

[23] The power vested in a trial judge to determine the inability of an assessor to continue acting as an assessor must be narrowly construed. Objectively adequate grounds for an inability must exist for a court to form the opinion that an assessor is unable to continue as an assessor in the trial. The reasoning underpinning the high court's decision was that the interests of justice militated against the trial being stopped and commencing *de novo* because it was not possible to secure Ms Solomons' presence. Since Ms Solomons was unwilling to continue as an assessor, for the reasons articulated in her letter, the learned judge reasoned that it was in the interests of justice to release her and continue with the trial before the remaining members. In so doing the high court erred.

[24] The learned judge relied on three decisions for justifying that the appellants' trial proceed before the remaining members of the court. The first case was *S v Jeke* 2012 JDR 1551 (GSJ)[5] (per Mbha J, Sutherland J concurring). This was an appeal from the Germiston Regional Court where the assessors, who were drawn from the community as part of a pilot project, were released from their duty as assessors because of their inability to continue. The reason being that the Department had terminated the usage of assessors due to a depleted budget. As a result of non-payment, the two assessors made it clear that they would no longer be available to act as assessors. The magistrate found that the assessors were unable to continue as assessors in terms of s 93*ter* (1) and (11) of the Magistrates' Courts Act 32 of 1944. Mbha J agreed with the magistrate.

[25] The second case was *S v Matakati & others* [2007] ZAWCHC 328.[6] In this matter an assessor had indicated to the court that in view of the trial having continued for longer than two years, which was more than he had predicted, his income from his legal practice as an attorney was severely affected. Ndita J found that the circumstances with which the court was confronted were precisely what s147 of the CPA contemplated.

[5]S v Jeke [2012] ZAGPJHC 153; 2012 JDR 1551 JDR (GSJ); [2013] JOL 29983 (GSJ).
[6]S v Matakati & others [2007] ZAWCHC 2006 (9) BCLR 1117 (N);

Ndita J was of the view that an assessor who lacked commitment to a trial is incapable of delivering justice to an accused, and therefore unable to act as an assessor. Whilst acknowledging that there has been consistency in judicial decisions that the word 'unable' relates to the assessors physical and mental inability, her firm view (relying on *S v Zuma* 1995 (1) SACR 568 (CC)), was that s147 of the CPA includes eventualities such as inability on the part of an assessor to deliver justice. She concluded that the assessor was unable to continue with the trial.

[26] The third case that the learned judge in the high court relied upon was *S v Khumalo* 2006 (9) BCLR 1117 (N)[7].In that matter during a protracted trial one of two assessors suffered a stroke. As a result, the assessor was unable to continue as an assessor. The learned Judge President stated that it would not be in the interests of justice that the case begin *de novo.*

Conclusion

[27] From an analysis of the above cases, relied upon by the high court, the following appears: *Jeke's* case dealt with a different statutory provision and is distinguishable. *Khumalo* is similarly distinguishable. There the assessor suffered a stroke and was for that reason unable to act. For the reasons mentioned in this judgment, *Matakati* was wrongly decided. The high court appears to have paid little regard to the decisions of this court in *Gqeba* and *Malindi*, both of which were not only instructive but were directly on point, and by which she was bound.[8]

[28] Clearly, the high court was faced with a dilemma whether to proceed with the trial in Ms Solomons' absence, or direct that the case starts *de novo* before another court. The situation was untenable especially since Ms Solomons had already absented herself indicating that she would not return. In these circumstances, the exasperation of the trial judge is understandable.

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[7] S v Khumalo 2006 (9) BCLR 1117 (N).

[8] True Motives 84 (Pty) Ltd v Mahdi & another [2009] ZASCA 4; 2009 (4) SA 153 (SCA); 2009 7 BCLK 712 (SCA); [2009] 2 All SA 548 (SCA) para 100 cited with approval by the Constitutional Court in Turnbull-Jackson v Hibiscus Coast Municipality 2014 (6) SA 592 (CC) para 55.

[29] The law is now settled that an accused person is at all stages of the trial to be tried by the court as constituted when the trial commenced, subject to the exceptions authorised by s147 of the CPA. Any deviation from that enduring principle can only have but one result that the proceedings are quashed.[9]

[30] Before I conclude this judgment, I am impelled to refer to the conduct of Ms Solomons, which must be deprecated. This was a clear case of abscondment and a dereliction of her duty as an assessor. Her conduct warrants a referral of this judgment to the Magistrate's Commission and the Legal Practice Council to investigate whether her conduct falls short of the standard expected of an officer of the court. To this end the registrar of this court will be directed to send a copy of this judgment to the Magistrate's Commission and the Legal Practice Council for whatever appropriate action they may consider necessary against Ms Solomons.

[31] In the result, the appeal must be upheld and both the convictions and sentences set aside.

[32] The following order is made:

1. The appeals are upheld.
2. The convictions and sentences of all the appellants are set aside.
3. The registrar of this court is directed to send a copy of this judgment to the Magistrate's Commission and the Legal Practice Council.

HK Saldulker
Judge of Appeal

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[9] S v Petersen & another 1998 (2) SACR 311 (C) at 312b-h; S v Gayiya [2016] ZASCA 65; 2016 (1) SACR 165 (SCA) para 6.

Appearances:

For First to Third Appellants A Mia

Instructed by:

Legal Aid South Africa, Cape Town

Legal Aid South Africa, Bloemfontein

For Fourth to Sixth Appellants: M Calitz

Instructed by:

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Legal Aid South Africa, Bloemfontein

For Respondent: J C Ntela

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