



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No. CA&R 10/2023

THE STATE

and

**LUNGISA NYALI
ASISIPHO NYALI**

Accused No. 1

Accused No. 2

JUDGMENT IN RESPECT OF PETITION

FOR SPECIAL REVIEW

HARTLE J

1. This matter came before me for consideration by way of a special petition from a regional court magistrate concerning a criminal trial which is parheard before him and in respect of which he has brought to our attention a certain irregularity in the proceedings.¹

2. The magistrate's concern reads as follows:
 - “4. When the accused pleaded on the 15th of August 2019 they were represented by Mr. M T Mduna. Two witnesses testified where after the (trial) was delayed due to various reasons.
 5. The new legal representative, Mr. Magcinwana, recently brought to my attention the fact that Mr. Mduna did not have right of appearance in August 2019.²
 6. I contacted Mr. Mduna and he responded in writing. His response is attached hereto.
 7. Since it is clear that Mr. Mduna did not have the right to appear on behalf of the accused, it is respectfully submitted that the proceedings in East London Case RC 1/88/18 should be set aside together with an order that it starts *de novo*”.

3. I agree with the magistrate's sentiments that the proceedings have been tainted by an irregularity and ought to be set aside. It is unnecessary to determine its impact i.e. whether it is merely technical or vitiating as it is notionally prejudicial to the accused. The approach in general is that in principle a fatal irregularity (i.e. one that vitiates the proceedings) takes place where an accused is represented by someone who does not have right of appearance.³

4. It appears that the accused's new legal representative is aware of and supports the referral of the matter to this court for appropriate intervention. There is no

¹ The High Court retains the inherent power by virtue of section 173 of the Constitution to review proceedings of this nature where the matter is parheard. Section 22 of the Superior Court Act, 10 of 2013 includes, as grounds for review of the proceedings of the Magistrate's Court, gross irregularity in proceedings.

² The response was not attached but no doubt indicates what the magistrate says it does.

³ See *S v Nghondzweni* [2021] JOL 29505 (FB) at paras [5] and [6].

objection by the state although the Director of Public Prosecution's consent for the present referral is not a requirement.

5. There is no reason, and certainly none has been suggested, why the proceedings, if they are proceeded with afresh, should not be before the same court, but in my view it is desirable that they should be before a different court.⁴

6. In the result I issue the following order:

1. The trial proceedings against the accused which were commenced in the regional court sitting at East London under Case No. RC 1/88/18 are set aside.

2. The matter is to commence "*de novo*" before a different court.

B HARTLE

JUDGE OF THE HIGH COURT

⁴ Although section 324 of the Criminal Procedure Act, No. 51 of 1977, which applies to situation where institution of *proceedings de novo* is ordered when an actual conviction or sentence has been set aside, it is significant that even when the reason is that there has only been a "*technical irregularity or defect in the procedure*", the proviso applies that "*no judge or assessor before whom the original trial took place shall take part in such proceedings*". By parity of reasoning the same consideration ought to be applicable *in casu*.

I AGREE,

M LOWE

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 24 January 2023