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NOT REFORMABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH, PRETORIA)**

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10/9/09

TO: MAGISTRATE BARBERTON
High court ref no. 489
Magistrate serial no. 10/09
Case no. 104/09

In the review matter:

STATE v MPIENASH NKOSI

REVIEW JUDGMENT

LEGODI J,

This matter was laid before me on automatic review in respect of accused 1 who was found guilty of attempted theft of Gold Ore at Consort Mine, Barberton. He appeared on this charge together with another accused who was represented by an attorney from the Legal Aid Board.

Initially the attorney represented both the accused 1 and the other accused, but withdrew as attorney for accused 1 at the start of the hearing of the matter.

The two accused were found guilty as charged on the main charge of theft and subsequently the unrepresented accused 1 was sentenced to two years imprisonment, one of which was suspended on appropriate conditions.

When this matter was initially laid before me, I raised the issue as follows with the Director of Public Prosecutions (DPP).

"The office of the Director of Public Prosecutions is requested to comment on whether the accused had properly pleaded to the charge and if not, whether such omission vitiated the proceedings?"

Whether the accused was not entitled to another legal representative from the Legal Aid Board after the first attorney withdrew as his attorney? And if so the accused was entitled to another legal representative, whether failure to afford the accused the opportunity to get another legal representative did not render the trial unfair?

The Director of Public Prosecutions is also requested to comment on the merits of the case and the appropriateness of the sentence imposed".

In response to the issues raised, Senior State Advocate, A Coetzee, with D F De Beer SC agreeing, held the view that, firstly, the accused 1 should have been afforded the opportunity to get another Legal Representative from the Legal Aid Board and that, failure to do so had vitiated the proceedings.

Secondly, on whether the accused 1 pleaded to the charge or not, the view is that it is doubtful whether the accused 1 had properly pleaded to the charge.

Lastly, on merits, the view held is that the accused 1's version might be reasonably possible true that, he did not know that his actions were unlawful.

Starting with the latter submission, the accused 1 was also charged with an alternative charge of contravention of section 98 of Act 29 of 1996, Mine Health and Safety Act, the allegations being that, they intentionally and unlawfully entered a mine or works or any shaft or place, or building where an alinery has been erected. The accused's version was that, he had been looking for a job for some times. He approached one, Andries, that should he hear about any job, Andries should inform the accused 1. Andries who was apparently, one of the four accused, told him about this job at the mine. He went to the mine in question with Andries and other accused on the understanding that they were going for a lawful job. They were then arrested at the mine by the Security Officers. The arresting security officers were in no way to rebut this version. Therefore just on merits alone, the accused 1 should have been given the benefit of doubt.

Coming back to legal representation, the attorney who represented the accused 1, placed on record, the following:

"Your worship, accused 1, presently it is like we are, the first time he consulted with me, he told me another version, but now he is actually portraying another version before court, but however accused 2 presently is sticking on that version, so I don't know what to do. I was applying so that I withdraw for accused 1 and continue for accused 2".

Having placed this on record, the proceedings then unfolded as follows:

"COURT: Okay, let us just explain to accused 1, your lawyer says that when you consulted with you, you told him one story and now you are telling him another story. He wants to withdraw as your lawyer at this time.

MR NYATHELA: Thank you, Your Worship, for accused 2?

COURT: No, I just want to know what is his story now, is he going to get another lawyer which he is going to pay or he is going to continue on his own. This bloody state just never ends. You must remember that the case had been finally remanded to today for plea and trial.

ACCUSED 1: Your Worship, Lucas to be offered an opportunity to get, I am sorry, to apply for another lawyer from the Legal Aid.

COURT: Sir, you know that, I know it seems like Christmas but it is not, if you told the lawyer that you were appointed by the Legal Aid Board two stories and he wants to withdraw, you will not get another lawyer from them. You cannot pick and choose, you get it for free, you understand, you are lying to your lawyer, that is what he says to court, because you have two different versions, so therefore he cannot represent you otherwise he stands up and he makes a fool of himself. You understand that?

PROSECUTOR: The state would also object, Your Worship, because what it comes down to is that because Mr Nyathela has acted ethically, he is now hoping to get another attorney from Legal Aid, who is unethical. That is what he is applying for, an unethical attorney.

COURT: Ja (inaudible) understands

ACCUSED 1: (Inaudible) admitted, your Worship, that yes indeed there was (inaudible) but there was not a way that it was an offence, I was just there because I was solely hired.

COURT: So what are you now saying, that you pleading guilty? Because if you where hired to go into the mine, you are pleading guilty, is that correct?

ACCUSED 1: Yes, Your Worship, I do admit it that I was there because as I was only hired, but I will say that I feel I am not guilty.

COURT: Okay, are you going to proceed without a legal advisor and pleading not guilty?

ACCUSED 1: Your Worship, we are just asking that if there is another one that is available to get his assistance.

COURT: No, there is no other person from the Legal Aid available, do you not understand sir, that you cannot tell a lawyer two stories and ask him to stand up and make a fool of himself. They do not do that, they have some sort of integrity that, ja, no, I do not know. Make up your mind quickly sir, you either get a lawyer of your own choice, which you pay or you proceed without a lawyer. That is your, you have had your choice, you have blown that.

ACCUSED 1: Your Worship, I do not have money to get a services of an attorney.

COURT: Okay, are you going to proceed on your own? Mr Mulangeni, I do not know how to explain it to him that he understands. Nou het hy 'n brief. He actually only needs to have paid I think. There had been a bail application for him, ja. You are not going to get bail sir, period. There was a formal bail application.

ACCUSED 1: Your Worship, my people brought a duplicate copy of the identity document.

COURT: That is not the duplicate of an ID document that he has there, what is that, you know ...

PROSECUTOR: (Inaudible) irrelevant, at this stage that he has been asked if he want to proceed, this is the trial.

COURT: And you see that he is trying to do to get out of it so that he can get away. Sir, I want the answer now, are you going to do your own case, or are you going to get a lawyer that you are going to pay for yourself? I think I must just go out and get a Valium otherwise I am...

ACCUSED 1: Your Worship, I did mention before that I do not have money to pay attorney.

COURT: Okay, the alternative, are you going that way. You are pleading not guilty and you are going on your own.

ACCUSED 1: Your worship, I wish you to have the services from the Legal Aid.

PROSECUTOR: Your Worship, I think he has been blowing his right to that, because it is an application for an unethical attorney, and there is no such thing in our law as an application for an unethical attorney, the Legal Aid does not cater for people who lie. It is a ridiculous question beside he cannot afford an attorney, they ... I suggest the Court instructs him to that he is going on his own.

COURT: Okay, that is exactly what I am going to do"

Clear from the record that the trial court denied the accused 1 of his right to legal representation. He or she was also not correct in conveying to the accused 1 that the Legal Aid Board would not afford him another attorney. As correctly indicated by the Director of Public Prosecutions, where legal representative withdraws on ethical grounds, an accused would be entitled to another legal representative appointed by the Legal Aid Board. It is sensible to do so. The denial by the trial court as reflected on record, goes into the very heart of the unfairness of the trial. On this alone, the proceedings ought to be set aside. For this reason, I have already ordered that the accused 1 be released from prison.

Before I conclude on this issue, I think indeed the attorney who initially represented the two accused should have withdrawn completely from the case. He had to cross-examine his ex-client in a matter where he had previously represented him. I find such a situation

to be untenable and in my view it should have been avoided, even if privilege information referred to by the trial court may not be disclosed.

I now turn to deal with the issue whether the accused 1 had pleaded to the charge. Despite attempts by the trial court to explain what had happened, it is still doubtful whether indeed the accused 1 had pleaded to the charge.

Whilst it is clear that the charges were put, nothing on record ^{as} indicating that the accused ever pleaded. In the situation referred to earlier in this judgment, at one stage the trial court suggested that the accused pleaded not guilty. This does not appear from the record. The trial court's response to the query goes like this.

"Reading the transcription, I realized that accused No 1's initial plea was not interpreted. He actually pleaded guilty and the interpreter immediately realized that he was not pleading according to his instructions to his lawyer. Mr Nyathela then spoke to him and after that withdrawal as his lawyer. Later, when I asked him if he then pleaded guilty. He said, he was hired by Andries, which actually was his plea explanation in terms of section 115 Act 51 of 1977. At that time, there was no doubt that he indeed pleaded. It is therefore my humble submission that he proceedings were not vitiated by accused no.1 not pleading"

This explanation by the trial court with greatest respect, only serves to deepen the confusion and doubt whether indeed the accused 1 pleaded. The fact that the initial plea was not interpreted, does not help to resolve the problem. On the explanation by the trial court it is not even clear whether the accused 1 pleaded guilty or not guilty, and if not guilty at what stage of the proceedings did he do.

This too, should justify the setting aside of the proceedings. But, had this being the only problem, we would probably have decided to refer the matter to start de novo. But of course it is not the only problem.

Consequently, I would propose to make an order as follows:

1. Conviction and sentence imposed on accused 1 are set aside.
2. The accused 1, Mr Mpienash Nkosi, if not yet released yet, to be immediately released from prison unless held on other charges.


M F LEGODI
JUDGE OF THE HIGH COURT

I, agree it is so ORDERED


W L SERITI
JUDGE OF THE HIGH COURT