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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

REVIEW NUMBER: HC 05/2023

MAGISTRATES' SERIAL NUMBERS:

06 AND 10/2023

CASE NUMBERS: A224/2019; 1/4/29 – [1074/22]

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

Case Number: A224/2019

In the matter between:

THE STATE

versus

ZITHOBILE SEKENI

ACCUSED 1

LIZALISE QIKANI

ACCUSED 2

FUZILE MGIDI

ACCUSED 3

VUYOLWETHU GUNGUTHWA

ACCUSED 4

SANDILE ZULU

ACCUSED 5

MALIBONGWE WITNESS QWABE

ACCUSED 6

CASE NUMBER: 1/4/29 – [1074/22]

In the matter between:

L[...] M[...]

APPLICANT

and

P[...] M[...]

RESPONDENT

CORAM: DJAJE AJP; PETERSEN ADJP

DATE RECEIVED: 18 OCTOBER 2023

DATE HANDED DOWN: 25 OCTOBER 2023

Summary: Special Review – Section 22 of the Superior Courts Act 10 of 2013 – gross irregularity in the proceedings - Section 22(1) and 33(1) of the Legal Practice Act 28 of 2014 – person holding himself out as a legal practitioner (attorney) without being admitted as an attorney, and for a fee – criminal proceedings set aside *in toto* – domestic violence proceedings set aside in part.

ORDER

- (i) The proceedings against the accused in **case number A224/2019 (S v Zithobile Sekeni and others)** are hereby reviewed and set aside.
- (ii) A decision whether to re-instate prosecution in the criminal trial is left to the discretion of the Director of Public Prosecutions, North West.

- (iii) Should prosecution be re-instated, the trial is to be conducted before a different presiding officer.
- (iv) The proceedings in the domestic violence application in **case number 1/4/29** 1/4/29 – [1074/22/] (L[...] N[...] and P[...] M[...]), save for the interim protection order which shall remain in place, are hereby reviewed and set aside.
- (v) The applicant and respondent (who is legally represented) in the domestic violence application must be subpoenaed to court by the Clerk of the Domestic Violence Court, Tlhabane. The Presiding Magistrate is then to inform the parties of the outcome of the review and the order at paragraph (ii), to afford the applicant an opportunity to consider legal representation afresh.
- (vi) A copy of this judgment is to be brought to the attention of the Chief Magistrate, North West Province.
- (vii) A copy of this judgment is further to be brought to the attention of the Director of Public Prosecutions for her consideration both as to re-instatement of prosecution and the conduct of Mr Motse which may merit appropriate action in accordance with the law.
- (viii) A copy of the judgment is to be brought to the attention of the Legal Practice Council (Professional Affairs).

REVIEW JUDGMENT

PETERSEN ADJP

[1] The review applications in this matter came before me on **18 October 2023** at the behest of the Senior Magistrate, Tlhabane, C G Becker, with a request to review and set aside the proceedings in the two implicated matters. The basis of the application is premised on an allegation that the “legal practitioner” who appeared for the accused in the criminal trial and the applicant in the domestic violence application, had no title and right of appearance at the time of these proceedings.

[2] The covering letter from the Senior Magistrate dated **27 September 2023** reads as follows:

“CASES SUBMITTED FOR SPECIAL REVIEW:

- | | | |
|--|--------------------|----------|
| 1. THE STATE v XITHOBILE SEKENI & 5 OTHERS | CASE | NO: |
| A224/19 | | |
| 2. M[...] P[...] v N[...] L[...] | 1/4/29 – [1074/22] | |
| | Domestic | Violence |
| Matter | | |

1. Request to have cases reviewed.
2. The proceedings in the abovementioned cases are not reviewable.
3. The abovementioned cases are enclosed herewith for the attention of a Honourable Reviewing Judge as matters deserving of special review according to Section 22(c) of the Superior Courts Act, Act 10 of 2013, to wit that there was a gross irregularity committed during the proceedings.
4. In both matters some of the parties were represented by one, Mr Johannes Teboho Motse.

5. The Chief Magistrate issued directives on the 12/12/2022 to the effect that all legal representatives before appearing in Court must submit the following documents:

- Certificate of Admission as attorney or Advocate
- Right of Appearance
- Fidelity Fund Certificate; to the Office of the Senior Magistrate.

6. Mr Motse submitted that his documents to Mr Gongxeka, one of the Additional Magistrates in the Criminal Court. It was handed to me and placed on the file where all the above mentioned documents are filed chronologically.

7. The documents are attached.

8. Another legal practitioner approached me and enquired whether we follow-up with the Legal Practice Council if a legal practitioner is indeed admitted and in good standing with the LPC.

He reported that Mr JT Motse is not an admitted attorney.

9. I accessed the LPC's website and could not find his credentials under the list of legal practitioners at all.

10. I wrote a mail to LPC and I ultimately received confirmation that he is not an admitted attorney nor registered with the LPC.

11. Correspondence to the effect is attached.

12. A criminal case was also opened under Tlhabane CAS 212/07/2023.

13. It is my submission that the proceedings be set aside and matters be heard before another Magistrate.”

[3] The proceedings in the implicated matters are not reviewable in terms of the relevant review provisions of the Criminal Procedure Act 51 of 1977 (‘the Criminal Procedure Act’). Section 22 of the Superior Courts Act 10 of 2013 (‘the Superior Courts Act’) does, however, provide a further statutory basis for the review of proceedings of the Magistrates’ Court on certain circumscribed grounds. It provides as follows:

“22 Grounds for review of proceedings of Magistrates’ Court

- (1) *The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are –*
 - (a) *absence of jurisdiction on the part of the court;*
 - (b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
 - (c) *gross irregularity in the proceedings; and*
 - (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*
- (2) *This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates’ Courts.*
(my emphasis)

[4] The basis for the Senior Magistrate forwarding the two matters on review on a consideration of the papers, falls within the ambit of a “*gross irregularity in the proceedings*” as envisaged in section 22(1)(c) of the Superior Courts Act, as will be demonstrated below.

[5] In respect of the criminal matter, the right to legal representation of detained and accused persons is entrenched in sections 35(2)(b) and 35(3)(f) of the Constitution of the Republic of South Africa, 1996. Section 35(3)(f) provides that an accused has a constitutional right to choose and be represented by a “*legal practitioner*”. In domestic violence applications, the applicant and respondent are ordinarily entitled to appoint legal representation at their own expense. The right to legal representation and the definition attributed to the phrase “*legal practitioner*” is dealt with in other law of general application, which includes the Criminal Procedure Act and the Legal Practice Act 28 of 2014 (‘the Legal Practice Act’). It is apposite to have regard to these pieces of legislation.

[6] Section 73 of the Criminal Procedure Act in respect of accused persons provides that:

“73. *Accused entitled to assistance after arrest and at criminal proceedings*

(1) *An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.*

(2) *An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.*

(my emphasis)

[7] The Legal Practice Act came into operation on 01 November 2018. When regard is had to the main purposes of the Legal Practice Act, it becomes clear that it envisages, in the main, the admission and enrolment of legal practitioners and the regulation of their professional conduct to achieve accountability.

[8] In the Constitution of the Republic of South Africa, the drafters employed the phrase *'legal practitioner'*, which is echoed in the Legal Practice Act. The Criminal Procedure Act on the contrary employs the phrase *'legal adviser'*. To dispel any uncertainty as to what is meant by the phrases *'legal practitioner'* and *'legal adviser'*, I align myself fully with the exposition in *S v Van Eeden* 2018 (2) SACR 218 (NCK) at paragraphs [13] – [16], where the following was said:

"[13] The expressions 'legal practitioner' and 'legal adviser' are not defined in, respectively, the Constitution and the Criminal Procedure Act (the CPA).

[14] In the Labour Relations Act the term 'legal practitioner' is defined as 'any person admitted to practise as an advocate or an attorney in the Republic'.

[15] In De Allende v Baraldi t/a Embassy Drive Medical Centre the word 'practitioner' was held to include an attorney or an advocate in the context of legal representation in proceedings in the magistrates' court. In fact, that the word 'practitioner' would, for purposes of such proceedings, include an attorney is clear when regard is had to s 20 of the Magistrates' Courts Act, which provides that 'an advocate or attorney of any division of the Supreme Court may appear in any proceedings in any court'.

[16] For present purposes it can, in my view, safely be assumed that an attorney would indeed in the normal course of events qualify as a 'legal adviser' and as a 'legal practitioner' for purposes of, respectively, the CPA and the Constitution. The definition of the word 'practitioner' in s 1 of the Attorneys Act is indeed that it means 'any attorney, notary or conveyancer' [emphasis added]. In fact, even a candidate attorney would by virtue of the provisions of s 8 of the Attorneys Act and S 21 of the Magistrates' Courts Act be able to act as 'legal adviser' in terms of the Criminal Procedure Act (and therefore in my view, by extension, as 'legal practitioner' for

purposes of the Constitution), provided that he or she 'is not in terms of any law prohibited from appearing at the proceedings'.

[9] The Legal Practice Act came into operation post *S v Van Eeden*. The definition of a '*legal practitioner*' in the Legal Practice Act makes it plain who qualifies as such. A legal practitioner is now defined as "*an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act.*" Section 24(1) of the Legal Practice Act provides that:

"24(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act."

[10] Section 33(1) of the Legal Practice Act further provides that: "*subject to any other law, no person other than a practising legal practitioner may, in expectation of a fee, commission, gain or reward, appear in any court or before any board or tribunal in which only legal practitioners are entitled to appear.*"

[11] The Chief Magistrate, North West Province issued a directive on **12 December 2022**, requiring all legal practitioners, before appearing in court to submit a certificate of admission as attorney or advocate; and a right of appearance and fidelity fund certificate, to the Office of the Senior Magistrate. This directive is a direct result of a review judgment of this Court handed down on **25 November 2022** in Review Number: HC 05/2022: *State v Masokane; S v Bokaba and S v Mokone*. Mr Johannes Teboho Motse pursuant to the directive submitted documents as required, purporting to be authentic and valid to an Additional Magistrate, Mr Gongxeka in the Criminal Court at Tlhabane. The said documents were subsequently handed to the Senior Magistrate who filed same in chronological order of legal practitioners.

[12] The Senior Magistrate was approached by a legal practitioner, whose identity has not been disclosed, who enquired if any follow up was made with the Legal Practice Council ("the LPC") to verify if legal practitioners were in fact

admitted and in good standing with the LPC. The said legal practitioner further intimated that Mr Motse was not an admitted attorney.

- [13] The Senior Magistrate acting on the aforesaid allegation, accessed the website of the LPC but could find any record of Mr Motse being an attorney or advocate. A letter was consequently written to the LPC, to verify if Mr Motse was in fact an admitted attorney in good standing with the LPC. The LPC responded on **02 June 2023** and under hand of Mrs MM Chadwick, a Senior Legal Officer – Professional Affairs of the LPC, confirmed that according to records held by the LPC, Teboho Johannes Motse was not an admitted attorney or advocate and that the LPC had no record of the Fidelity Fund Certificate issued under number F[...].
- [14] In the absence of any information to the contrary, Mr Motse *prima facie* presented a fraudulent admission certificate and fidelity fund certificate, which was uttered, upon presentation to Magistrate Gongxeka.
- [15] Mr Motse accordingly appeared in the criminal matter and domestic violence application under review, in contravention of section 24(1) and 33(1) of the LPA. A similar application implicating Mr Motse was considered in this Court, in which the proceedings were set aside. See Review 04/2023: S v Mokoena and 3 others and S v Monkwe (**04 September 2023**). I surmise that there may be many more applications of a similar nature which may be in the process of preparation by the Senior Magistrate. The Senior Magistrate is accordingly encouraged to collate any remaining applications to be considered by this Court rather than submitting same on a piecemeal basis.
- [16] The sentiments expressed at paragraph [46] of *S v Van Eeden, supra* in echoing *S v Mkhise; S v Mosia; S v Jones; S v Le Roux 1988 (2) SA 868 (A)* at 872G and 875C are accordingly equally applicable in the present matter:

“In my view this irregularity is “of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred” and “when

considerations of public interest are paramount, hardship in a particular case, should it arise, is to be regretted but cannot be avoided.”

[17] The proceedings in the criminal trial stand to be reviewed and set aside *in toto*. In the domestic violence application, an interim protection order was granted prior to the applicant instructing Mr Motse to appear on her behalf. In my view, the status of the interim protection order should remain extant, but the further proceedings in which Mr Motse appeared are tainted and stand to be reviewed and set aside.

[18] The sentiments expressed in *S v Van Eeden* at paragraphs [48] to [51] resonate with me in respect of the criminal matter and I propose to adopt the same approach. Olivier J said the following in this regard:

“[48] The next question is whether this Court should then remit the matter to the Regional Court and order that the accused be tried de novo. This is the order initially suggested by Ms Makhaga.

[49] Although such an order is quite common in cases where proceedings are set aside, it has often been held to be undesirable. In S v La Kay it was held that the provisions of section 324 of the Criminal Procedure Act provided the prosecuting authority with a discretion to decide whether to charge an accused again and that an order that an accused be tried de novo would interfere with that discretion.

[50] In my view this approach should find equal application in cases like the present, where the criminal proceedings have not been finalised and there has therefore not been a conviction and a sentence. There may well be cases where the Director of Public Prosecutions may decide not to reinstitute the charge, for instance where a complainant no longer wishes it.

[51] If it is decided to prosecute the accused again the trial should, in view of the fact that the present Regional Magistrate has heard evidence on the merits, be conducted before a different Regional Magistrate. This would be consistent with the proviso to section 324 of the Criminal Procedure Act in cases where a conviction and

sentence are set aside. Ms Makhaga also made the valid point that the accused would, in the event that he is again faced with the same charges, be entitled to reconsider his plea and his instructions to his legal representative, and that a trial before the same Regional Magistrate would compromise that right. The prosecution may also be prejudiced, because the Regional Magistrate may already have formed an unfavourable opinion regarding the demeanour of a prosecution witness.”

[19] In the result, it is ordered that:

- (i) The proceedings against the accused in **case number A224/2019 (S v Zithobile Sekeni and others)** are hereby reviewed and set aside.
- (ii) A decision whether to re-instate prosecution in the criminal trial is left to the discretion of the Director of Public Prosecutions, North West.
- (iii) Should prosecution be re-instated, the trial is to be conducted before a different presiding officer.
- (iv) The proceedings in the domestic violence application in **case number 1/4/29** 1/4/29 – [1074/22/] – **L[...] N[...] and P[...] M[...]**, save for the interim protection order which shall remain in place, are hereby reviewed and set aside.
- (v) The applicant and respondent (who is legally represented) in the domestic violence application must be subpoenaed to court by the Clerk of the Domestic Violence Court, Tlhabane. The Presiding Magistrate is then to inform the parties of the outcome of the review and the order at paragraph (ii), to afford the applicant an opportunity to consider legal representation afresh.
- (vi) A copy of this judgment is to be brought to the attention of the Chief Magistrate, North West Province.

- (vii) A copy of this judgment is further to be brought to the attention of the Director of Public Prosecutions for her consideration both as to reinstatement of prosecution and the conduct of Mr Motse which may merit appropriate action in accordance with the law.

- (viii) A copy of the judgment is to be brought to the attention of the Legal Practice Council (Professional Affairs).

A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH
AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

J T DJAJE
ACTING JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG