

SOUTH AFRICA / JUDGMENT

Casswell v S (CA 91/2022) [2023] ZANWHC 14 (18 January 2023)

[2023] ZANWHC 14

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Reddy

CASE / FILE NUMBER

CA 91/2022

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IN

THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: CA 91/2022

Reportable:

NO
Circulate
to Judges: NO
Circulate
to Magistrates: NO
Circulate
to Regional Magistrates: NO
In

the matter between:

MAKGAILA
KABELO CASSWELL APPELLANT
and
THE
STATE RESPONDENT

Coram:

Petersen J, Reddy AJ

Heard:

02 December 2022
Handed

down:

18 January 2023

ORDER

(i) The

application for the late filing and prosecution of the appeal is
condoned.

(ii) The

appeal succeeds and the conviction and sentence are set aside.

(iii) The

decision on whether or not to re-instate prosecution against the
appellant is left to the discretion

of the Director of Public

Prosecutions, North West.

(iv) A

copy of this judgment is to be forwarded to the Magistrates'

Commission, the Acting Regional Court

President, North West and the

Director of Public Prosecutions, North West by the Registrar of this
Court.

JUDGMENT

REDDY AJ

Introduction

- [1] The appellant was charged in the Regional Court Klerksdorp on a count of murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 ("the CIAA") as set out in the charge. The charge the appellant was called upon to plead to on 20 June 2018 was that of murder without any reference to either section 51(1) or 51(2) of the CLAA. The Regional Magistrate, however, explained the discretionary minimum sentences of fifteen years' imprisonment and life imprisonment and it is accordingly accepted that the appellant was aware of the applicable sentences in the event of a conviction. The appellant pleaded not guilty, and raised private defence as a ground of justification to negate the unlawfulness of his actions.
- [2] On 17 July 2018, the appellant was convicted of murder within the purview of section 51(1) of the CLAA and on the same date sentenced to life imprisonment and declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

The application for condonation

- [3] The appellant appears to have filed a notice of appeal against the conviction and sentence on 29 June 2022. Given the fact that the notice of appeal was filed eighteen days short of four years, a condonation application was mandatory. It was incumbent on the appellant to move a substantive application for condonation, as condonation is not for the mere asking.

- [4] The law on condonation is best summarised with reference to the oft quoted passage by Holmes JA in *Melane v Santam Bank Insurance co. Ltd* 1962 (4) SA 531 (A) at 532 B-E where the following was stated:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon the consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily, those facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and the strong prospects of success may tend to compensate for a long delay." (See also *Wynberg and Another* (1998) SACR 18, 1998 (3) SA 34 (SCA) at 40 H-41 E)"

- [5] The Supreme Court of Appeal (SCA) in *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited* 2017 ZASCA 88 restated the factors that are to be given due consideration in a condonation application as stated in *Melane*, that:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

- [6] In *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at paragraph [23] the following was said:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

- [7] The salient facts in support of the appellant's condonation application can be succinctly set out as follows: On 17 July 2018, immediately after the appellant was sentenced, he informed Miss Votano his legal representative that he wished to file an appeal against the conviction and sentence. The appellant was informed that the record of proceedings had to be transcribed and legal representation by Legal Aid South Africa would have to be secured to prosecute the appeal in the High Court. The appellant began serving his sentence at the Klerksdorp Correctional Facility. No sound assistance was provided to the appellant at the Klerksdorp

Correctional Facility notwithstanding the completion by the appellant of the requisite forms to prosecute his appeal.

- [8] On 23 August 2018, the appellant was transferred to the Rooigrond Correctional Facility, Mahikeng where at some point a certain Mr Roman from Legal Aid South Africa, assisted him with the completion of the necessary forms to secure legal representation on appeal. Thereafter, no information was provided as regards the progress of his appeal. On 25 March 2021 the appellant was transferred to Kutama Sinuthumule Correctional Facility, Limpopo. The appellant made enquiries to the Klerksdorp Court regarding progress with the transcription of the court record and was informed that upon receipt of the court record it would be forwarded to the Legal Aid Office for the prosecution of his appeal.
- [9] On 23 June 2022, Mr Gonyane from Legal Aid South Africa, confirmed that the court record had been received. Mr Gonyane was instructed by the appellant to proceed with the appeal against the conviction and sentence. On 29 June 2022, the notice of appeal was delivered challenging the conviction and sentence.
- [10] An examination of the appellant's explanation against the background of the jurisprudential condonation principles set out above is required. The application for condonation is not opposed by the respondent.
- [11] The appellant has proffered a full explanation which excludes any default on his part for non-compliance with the Rules of Court. The appellant whilst serving his sentence was essentially hamstrung in prosecuting his appeal due to the delay in securing the trial record. The appellant was incarcerated in various Correctional Facilities and logistical problems would have made it extremely difficult to secure the court record. The prospects of success further lean in favour of the appellant. In short, the threshold of sufficient cause has been met. Accordingly, I am inclined to grant an order that the application for the late filing of the appeal and prosecution thereof be condoned.

Grounds of Appeal

- [12] I propose to delineate the grounds of appeal against the conviction and sentence as set out in the Notice of Appeal, individually.
- [13] The conviction is challenged as follows:

"AD CONVICTION

1. It will be argued that the court a quo misdirected itself by the failure to appoint assessors in terms of section 93ter (1) of the Magistrate's Court Act 32 of 1944 and as a result, the trial was unfair.

1.2 It will be argued that the court misdirected itself by finding that the appellant is guilty of murder."

- [14] The following grounds are raised in respect of the sentence imposed:

"AD SENTENCE

2. It will be argued that the trial court misdirected itself by imposing the sentence of life imprisonment wherein the appellant was charged with the offence of murder (read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997)

"2.1 It will be argued that the trial court misdirected itself by failure to find that the appellant's personal circumstances are substantial and compelling circumstances justifying a departure from the prescribed sentence. "

The main ground of the appeal: Section 93ter of the Magistrates Court Act 32 of 1944

[15] In light of the view taken by this Court on the appeal, a summary of the facts leading to the appellant's conviction and sentence is rendered superfluous. It is axiomatic, that should the conviction be upheld, the sentence would automatically fall away.

[16] The focal point of the appellant's attack on the conviction before this Court is that the Regional Magistrate misdirected himself by failing to appoint assessors in terms of section 93ter (1) of the Magistrate's Court Act 32 of 1944 ("the MCA"). The respondent opposes the appeal against conviction and sentence. The main basis of opposition by the respondent on conviction is an intimation by Miss Votana, the appellant's legal representative at trial, when she said the following:

"I appear on behalf of the accused. We are ready for trial. We require no assessors to be present."

[17] Section 93ter (1)(a) of the MCA provides as follows:

"93ter Magistrate may be assisted by assessors

(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

(a) before any evidence has been led;

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

[18] It is apposite to revisit the authorities from the Supreme Court of Appeal, this Division and other Divisions in respect of section 93ter of the MCA. The Supreme Court of Appeal has removed any ambiguity in respect of the interpretation of section 93ter (1) in *S v Gayiya* 2016

[2] SACR 165 (SCA). In the recent judgment of *Mntambo v S* (478/20)

[2021] ZASCA 17 (11 March 2021) the ratio in *Gayiya* was re-iterated by the SCA as follows:

"[9] Until the judgment in *S v Gayiya* there were conflicting judgments in relation to the interpretation of s 93ter (1). This Court in *Gayiya* referred to *Chala and Others v Director of Public Prosecutions, KwaZulu-Natal and Another*, stating that the conflicting authorities had been succinctly dealt with in that case. In *Gaviva*, it was held that the appointment of assessors was peremptory, unless the accused requests, prior to him pleading to a charge of murder that the trial should proceed without assessors. Mpati P stated:

'In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors. unless he (the accused) requests that the trial proceed without assessors.

...

[10] The court held that the failure to comply with the proviso resulted in the court not being properly constituted and it set aside the conviction and sentence. In *Shange v S*, Lewis JA referred to and endorsed *Gayiya*. She stated:

'In *S v Gayiya* 2016 (2) SACR 165 (SCA) this court, referring to *Chala v DPP, KwaZulu-Natal* 2015 (2) SACR 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not sat with assessors, and the accused had not requested that the trial not proceed with assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.

[11] In the present matter, it is clear from the record of the proceedings that the appellant was not afforded an opportunity by the magistrate to decide whether to request that the trial proceed with or without assessors before he was asked to plead. It is common cause that there was non-compliance with the proviso to s 93ter (1) of the Act in that no assessors were appointed in terms of the proviso to the section and the appellant did not waive his right to such appointment. This is a fatal misdirection which vitiates the proceedings. The State properly conceded the point and accepted that the conviction and sentence should be set aside and the appellant immediately released from prison. The appeal must therefore succeed "

(my emphasis and underlining)

[19] In *Tsietsi Mmusi v The State* (Case No: CA55/2020), an unreported judgment of this Division, Petersen J postulates the following on the application of section 93ter at paragraphs [1 1], [13] and [14]:

"[11] The trial record reads as follows on the issue of the appointment of assessors:

"COURT: Part II schedule 2. Let us deal with the assessors first. In your opinion, is there any need for assessors in this matter?

PROSECUTOR: No.

MR TLATSANA: None Your Worship.

COURT: Okay. I am of the opinion that it is not expedient in the administration of justice to have assessors appointed to assist this court. Part II schedule 2. Right. If this court convicts you of the offence of murder sir, then a term of imprisonment for a first offender of 15 years shall be, of not less than 15 years shall be imposed upon you. For a second offender it is not less than 20 years. For a third and subsequent offender of not less than 25 years. Do you understand?

ACCUSED: Understood Your Worship.

(my emphasis)

[13] The appellant was not afforded an opportunity by the regional magistrate to indicate if he wanted the trial to proceed with assessors or not. The submission by his legal representative did not suffice for purposes of section 93ter (l)(a) of the MCA. The authorities from the Supreme Court of Appeal, by which this Court is bound, are clear, in that it constitutes a fatal misdirection which vitiates the proceedings.

[14] The failure to comply with section 93ter (l)(a) in accordance with the authorities of the Supreme Court of Appeal has serious implications. It results in the trial being rendered unfair and a failure of justice. In the present matter it is clear that the issue of the assessors was only raised on the date of trial. It may be prudent that this very important issue be raised as early as the disclosure stage when copies of the docket and charges are discovered to the defence. Otherwise put it should be a crucial consideration during the pre-trial procedure before setting a trial date. It should be emphasized that what is required to give effect to the provisions of section 93ter (l)(a) of the MCA is essentially a brief enquiry where the accused is fully apprised of the implications of the said section. so as to make an informed decision. '

(my emphasis)

[20] The approach adopted in *Mmusi* is not novel in this Division. In fact, the prevailing law in this Division which echoes the law in the SCA, is succinctly set out in the unreported judgment of *Van Staden v S* (CA21/2017) [2018] ZANWHC 82 (26 April 2018), where Gutta J said:

"[6] On reading of the foregoing provisions it is clear that Section 93 is couched in peremptory terms, namely that a judicial officer "shall" be assisted by two assessors unless the accused who is charged with murder requests that the trial proceed without assessors. Hence the appointment of assessors is compulsory unless the accused, prior to pleading, waives the need for assessors.

[7] The starting point therefore, is for the Regional Magistrate to inform the accused before the commencement of the trial about the provisions of Section 93. It is only where an accused requests that the trial proceed without assessors, that the judicial officer becomes clothed with a discretion either to summons one or two assessors to assist him or to sit without an assessor.

[8] The appellant was not informed by the Regional Magistrate of his right to have assessors appointed and was not called upon to make a choice whether or not to request that the trial proceed without assessor before he was asked to plead to the charges.

[9] Counsel for the State, Mr Moeketsi conceded this point and relied on the case of *S v Nhlapo and Others* to submit that failure to appoint assessors constitutes a gross irregularity. Mr Moeketsi submitted that because of the irregularities, the sentences of fifteen (15) years and life imprisonment imposed by the Court a quo should be set aside and that the proceedings should be declared void ab initio and should commence de novo before another presiding officer."

[21] The authorities in this Division which accords with the authorities of the SCA prevails in, inter alia, the Eastern Cape and Kwa-Zulu Natal. In *S v Langalitshoni* 2020 (2) SACR (EMC) by way of comparison, where one of the counts was murder, the following transpired between the Regional Magistrate and the legal representative of the appellant without engaging the appellant which the Court found vitiated the proceedings:

"[4] The magistrate then addressed the legal representative of the appellant in the following manner:

"Yes [name], as I said there is no pre-trial conference, according. to the charge sheet yes, among the counts there is a murder count, where the assessors are supposed to be there, are you going to use the services of the assessors?"

The response was:

"No, your worship."

"[8] The statement of the legal principle quoted in the preceding paragraph has the effect of creating an obligation on the part of a regional magistrate presiding over a trial involving a charge of murder. There are two essential obligations. The first is to inform the accused before the commencement of the proceedings what the peremptory

provisions of the law require to ensure the proper constitution of the regional court. The second element is to inform the accused

person that he or she may elect to proceed with the trial without assessors.

[9] In my view, it is a relatively simple matter for a regional magistrate to discharge both elements of the obligation. What is required is a repetition of the legal principle quoted elsewhere in the judgment. Ideally, the communication of the legal principle should be made in a direct manner by the magistrate addressing the accused person, who should be asked at that stage to indicate whether or not he or she has been aware of the peremptory provisions. The legal representative of the accused person may then be asked by the magistrate to confirm the correctness of the answer given by the accused person. It is then necessary for the magistrate to ask specifically whether the accused person wishes to permit the trial to proceed without assessors. At this point a magistrate would not be criticized for giving a brief outline of the role played by assessors in a criminal trial. The magistrate ought to be satisfied that the answer given by the accused person demonstrates an appreciation of the nature of the question and reflects a reliable response in the circumstances. The accused person has a right to be tried in a fully constituted court. An election to proceed without assessors amounts to a waiver of such right. A waiver of a right cannot be achieved without knowledge thereof. That this is so should be checked with the accused and the legal representative.

[11] In asking "are you going to use the services of the assessors", the magistrate is not conveying to the appellant that the proper constitution of the court requires that the magistrate ordinarily sit with two assessors. The question posed suggests that the court is constituted ordinarily by the regional magistrate sitting alone. It conveys the suggestion that the appellant's legal representative has a right to request the participation of assessors as an additional 'service'... what is required is an indication of whether or not the appellant elected to waive an existing right. One cannot simply assume that, because of the preamble contained in the magistrate's questioning, one can accept that both the magistrate and the legal representative knew that the right created thereby could be waived by the appellant and that the legal representative of the appellant was indeed unequivocally waiving the right created by the section. It is also of concern that the appellant was not addressed personally by the magistrate and that the correctness of his or her answer was not thereafter confirmed by the legal representative. '

(my emphasis and underlining)

[22] In *Nxumalo v s* (AR263/2019 RC51/2013) [2022] ZAKZDHC 23 (10 February 2022), Lopes J adopted a similar approach with reference, inter alia, to *Langalitshoni*, where he said:

"(4) The record reveals that:

(a) on the 26th September 2013, Mr Zulu was appointed as the new attorney for both Mr Nxumalo and Mr Mdluli. The typed version of the record states that:

'Mr Zulu informed the court that the defence does not require the assessors.'

(b) on the 9th December 2013, a pre-trial conference was held, and opposite the word 'Assessors' appears the manuscript recorded that 'Defence does not need assessors'. There is no indication that the pre-trial meeting was held in the presence of either the learned magistrate or Mr Nxumalo; and

(c) When the trial commenced on the 31 st March 2014, the following was recorded:

'COURT Advocate Zulu maybe if you could just confirm this - that the defence does not require the assessors. I know that is what transpired during pre-trial conference. Is that still the position, they do not require?

MR ZULU Yes, that is correct, that is still the position. '

[5] Nothing further was said on that subject, and Mr Nxumalo was not asked to confirm what his attorney had said, nor whether he wished to add anything. The authorities make it clear that the proviso to s 93ter(1) sets out the manner in which the court is normally to be constituted - the magistrate and two assessors, and unless an accused person requests the court not to sit with assessors, the court will not be properly constituted without assessors.

[6] In *S v Du Plessis* 2012 (2) SACR 247 (GSJ), the court set out the importance of assessors, and found that the failure to consider to appoint assessors rendered the trial a failure of justice. The court, however, indicated that it would be sufficient to determine whether the need for assessors would be waived, if the presiding officer were to enter into discussions with the accused or his legal representative.

[9] The crisp issue which arises in this matter is whether the communications with regard to the appointment of assessors between the prosecutor and Mr Zulu (in the pre-trial hearing), or the exchange in court between the learned magistrate and Mr Zulu were sufficient. Mr Nxumalo himself, was not involved in these discussions, save for being present when the learned magistrate spoke to Mr Zulu.

[10] The proviso was never explained to Mr Nxumalo, and he never made a request not to sit with assessors. Whether his legal representative explained the proviso to him, is also not reflected on the record. Had that been the case, the learned magistrate could have engaged Mr Nxumalo so that he could have confirmed his understanding of the section, and his request not to have assessors.

See too: *Hlatshwayo and Another v State* (AR 354/20) [2022]

ZAKZPHC 8 (28 March 2022) at paras [41- [17]; *Zulu v S* (AR 319/2021) [2022] ZAKZPHC 20 (13 May 2022) at paras [15][30].

[23] The respondent in the present appeal essentially submits that the intimation of Miss Votana above suffices for purposes of section 93ter of the MCA. This submission predicated on the terse statement of Miss Votana as demonstrated above, does not accord with the authorities of the SCA and other Divisions of the High Court and more importantly is in conflict with the authorities in this Division, to which sadly lip service is paid as a number of recent appeals demonstrate.

[24] In a nutshell, the issue of the assessors was not canvassed directly with the appellant, as he was not afforded an opportunity to participate on how the court should be constituted in terms of section 93ter of the MCA. There is nothing in the record to suggest

that the appellant understood the nature and import of assessors and the role that the assessors may play. The guidance provided by the SCA in *Gayiya* was clearly not adhered to. The fact that the appellant was legally represented is of no moment as it was the appellant's right to determine the constitution of the court and the Regional Magistrate was duty bound to explain the legal principles envisaged in section 93ter of the MCA to the appellant.

[25] The Regional Magistrate was duty bound to ensure that the appellant fully understood the implications of section 93ter which embraces his fair trial right and that the appellant made an informed decision to waive his right in terms of section 93ter of the MCA. This waiver had to be confirmed by the appellant and duly reflected on the court record. This three stage process is conspicuously absent from the court record and in direct conflict with the sentiments expressed at paragraph [1 1] of *Mntambo* by the SCA.

[26] The fine thread which intertwines our law on the application of section 93ter, is that an accused must have knowledge of his or her fair trial rights and must be able to exercise such rights. An accused cannot be muzzled and subdued into silence simply because he or she is legally represented.

[27] In *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC), the right to a fair trial was emphasized by Nkabinde J as follows:

"The right to a fair trial...has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime...More importantly, the proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy"

[28] In the exercise of fair trial rights substance must triumph over form.

(See *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC), *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC), *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC). In *Zuma*, Kentridge AJ formulated the position as follows:

"The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. 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; S v Mthwana* 1992(1) SA 343(A), the appellant, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of appeal in South Africa was to enquire-

'whether there has been an irregularity or illegality, that is a departure from the formalities, rules principles of procedure according to which our law requires a criminal trial to be initiated or conducted'

A Court of appeal, it was said (at 377).

'does not enquire 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 justice. '

"That was an authoritative statement of the law before 27th April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with those 'notions of basic fairness and justice. It is now for all courts hearing appeal trials or criminal appeals to give content to those notions.
"

[29] It is clear that the Regional Magistrate favoured form over substance. Section 35(3) of the Constitution mentions 15 broad rights that provide the litmus test as to what a fair trial should be. The list is not exhaustive. The appellant was not given an opportunity to exercise a crucial trial right related to the constitution of the trial court, which would have a bearing on whether the state had proved the case against the appellant beyond a reasonable doubt. The fact the appellant was represented is of no store and does not belie the irrefutable ipsa verba of the court record, which unequivocally confirms the absence of an explanation to the appellant and the non-participation of the appellant on the decisive issue of constitution of the trial court.

Conclusion

[30] The improper application of section 93ter (1) (a) of the MCA has consequences. It tainted the trial in that it resulted in a gross violation of the appellant's right to a fair trial. This domino effect of form over substance vitiates the proceedings.

[31] In *Van Staden* the Court dealt with the way forward upon setting aside the conviction and sentence, as follows:

"[12] On the issue of the matter being referred back to Regional Court for trial de novo, the Court in *Khambule v The State* (Bophuthatswana Provincial Division (CA No 2013/04) supra at paragraph 7.10 said the following:

"7.10 This brings us to the respondent's submission that the matter be referred back for trial de novo before a different Magistrate. In *S v Balatseng* 2005(2) SACR 28 (Bophuthatswana Provincial Division), an application was made on behalf of the State that the matter be referred to a trial de novo, and this application was opposed. After several cases were considered the following was said at 39E-F by Mogoeng JP: "such an order should be made only when all parties to the appeal agree that the accused be tried de novo. The only instance where it is permissible to order that a trial should start de novo without first securing the agreement of the accused is in the case of an automatic review.

7.10 Again at 39 (3-1 of the *Balatseng* case supra, Mogoeng JP stated that the provisions of section 322(1)(c) of the Criminal Procedure Act 51 of 1977 empowered the Court to make such an order as would serve the interests of justice. However, where the Court had determined that the trial proceedings were irregular and where it was not necessary for consideration of the merits of such case, the Court would not order a trial de novo in the absence of an agreement by the parties to the appeal. In this way the accused would be afforded the opportunity to raise such defence/s he may wish to raise at a retrial.

The Court was not made aware that an agreement had been secured by the parties".

[13] In casu, counsel for the appellant, Mr Setumu agreed that the matter could be referred back to the Court a quo to commence proceedings de novo."

[32] In a recent unreported review judgment in this Division, *S v Patrick Thabo Masokane, S v Tebogo Bokaba and S v Jobias Mokone* (Case Numbers RE 91/2021, RE 884/2022 and RE-481/2022) (25 November 2022), Petersen J with Hendricks JP concurring, dealt with the issue as follows:

"[14] The proceedings in the implicated cases accordingly stand to be set aside. The sentiments expressed in *S v Van Eeden* at paragraphs [48] to [51] resonate with me and I propose to adopt the same approach in my order. 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. "

[33] There is no agreement on referral of the matter back to the Regional Court to commence de novo. The decision on re-instating prosecution in accordance with the authorities in this Division is accordingly left to the discretion of the Director of Public Prosecutions, North West.

Order

[34] Resultantly, the following order is made:

- (i) The application for the late filing and prosecution of the appeal is condoned.
- (ii) The appeal succeeds and the conviction and sentence are set aside.
- (iii) The decision on whether or not to re-instate prosecution against the appellant is left to the discretion of the Director of Public Prosecutions, North West.
- (iv) A copy of this judgment is to be forwarded to the Magistrates' Commission, the Acting Regional Court President, North West and the Director of Public Prosecutions, North West by the Registrar of this Court.

A REDDY

ACTING JUDGE OF THE HIGH COURT

I agree

A H PETERSEN

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Mr

T G Gonyane

Instructed by: Legal

Aid South Africa

Mafikeng Justice Centre

No. 742 Dr. James Moroka

Drive

MMABATHO'

For the Respondent: Adv

J Maseko

Instructed by: Director

of Public

Prosecutions

Megacity Building East Gallery

3139 Sekame Street MMABATHO

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Prepared on 12 October 2026 · Esheria