

SOUTH AFRICA / JUDGMENT

Gabani v S (CA&R 24/2018) [2020] ZAECBHC 20; 2021 (1) SACR 562 (ECB) (7 September 2020)

[2020] ZAECBHC 20

COURT

Eastern Cape High Court, Bhisho

BEFORE

I.T. Stretch, M.S. Rugunanan, M.S. Dunywa

CASE / FILE NUMBER

CA&R 24/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE LOCAL DIVISION, BHISHO
Case
no. CA&R 24/2018
In

the matter between:	MTHETHELELI GABANI Appellant and THE STATE Respondent APPEAL
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JUDGMENT

STRETCH J:

“Justice is conscience, not a personal conscience

but a conscience of the whole of humanity.

Those who clearly recognize the voice of their own conscience

usually recognize also the voice of justice.”

- Aleksandr Isayevich Solzhenitsyn

[1] On 3 August 2011 the appellant (Mthetheleli Gabani) and three others were arraigned on a charge of gang rape in the Mdantsane regional court before Gixana Esq. The appellant was 28 years old at the time. This was his first brush with the law.

[2] The rape was alleged to have taken place a year ago. The accused were represented by one Mr Mnyute. They appeared in the following order:

Accused no. 1: Lazola Ndadlana

Accused no. 2: Lubabalo Ngala

Accused no. 3: Siphiwo Kunene

Accused no. 4: Mthethelele Gabani (the appellant)

[3] Accused nos 1 and 3 pleaded consensual sexual intercourse[1]. The appellant and accused no. 2 denied having had intercourse with the complainant.

[4] The complainant testified that she had hitched a lift with the four accused. She sat in the front seat of the vehicle next to the driver. En route they stopped the vehicle and took turns to rape her. The driver of the vehicle raped her once while his companions restrained her. He then went off with the car to buy cigarettes while his co-accused continued to rape her repeatedly. He did not return.

[5] Some time thereafter she was travelling with the police when she saw the appellant, whom she identified to the police as having been present when she was raped. One of the policemen fetched the appellant and placed him in the police vehicle. The appellant said he did not know the complainant.

[6] At the trial the complainant initially made a dock identification of accused no. 1 as the driver of the vehicle and then corrected herself and pointed out the appellant. An affidavit which she had purportedly deposed to, stated that there were five males in the vehicle and not four, with two of them occupying the front seat and three in the back seat.[2] The document further stated that she was the fourth passenger in the back.[3]

[7] During cross examination she stated that the vehicle was not a sedan but actually “a small bakkie”. She disputed that she first met the accused at a venue by the name of “Wine and Dine”, and that she had accompanied them to “Bazuka’s Tavern” (where liquor was purchased) whereafter they all ended up at a party at a third tavern. She also disputed that she had had consensual intercourse with accused no. 3 in the bakkie at Wine and Dine before the others had boarded the vehicle. She denied that she had engaged in consensual intercourse with accused no. 1 at his shack while his companions were in Bazuka’s Tavern, and that accused no. 1 had purchased alcohol for her there.

- [8] She testified that although she did not see who the first person was who had raped her, she had assumed that it was the appellant, because he had said that he would rape her first at the time that they were alighting from the vehicle, and he had also commenced undressing himself. In her evidence in chief she said that accused no. 2 only penetrated her slightly. During cross-examination she said that she was referring to accused no. 3 when she said this, but then reverted to accused no. 2 upon questioning by the magistrate.
- [9] All the accused testified in their defence. The transcript however does not reflect the evidence of accused no. 3 and that of the appellant. Accused no. 2, when he testified, confirmed the appellant's version as put to the complainant.
- [10] The trial magistrate convicted all four the accused, inclusive of the appellant. According to the transcribed judgment the magistrate's primary reason for convicting the appellant (apart from relying on the complainant's assumption that he did) was because he was in the presence of his co-accused on the day in question. In my view the magistrate, in convicting the appellant, placed far too much reliance on the uncorroborated evidence of the complainant. Her evidence did not pass muster as having been sufficiently honest and reliable in order for a conviction to be secured based on her testimony as a single witness.

Furthermore, a number of errors and misdirections are evident upon a cursory reading of the judgment. I mention a few:

- a. The record reflects that the complainant had said that she was picked up by a small bakkie with no canopy, with two occupants in the cab and two in the bin. She testified that she was seated between the driver and the passenger in the cab. The magistrate however recorded that the complainant had referred to four passengers in the back and two occupants in the front, making the occupancy of the vehicle a total of six men before she boarded.
- b. The complainant testified that she was not sure whether the appellant had worn a condom when he raped her. The magistrate found as a fact that he did, that the complainant had testified to this effect, and that this was the reason why the appellant's DNA could not be linked to the complainant. However, later in the judgment the magistrate remarked that the complainant had said that it was "possible" that the appellant had worn a condom.
- c. It was the version of accused nos 1 and 3 throughout the trial that the complainant had engaged in consensual sex with them. The magistrate however, originally incorrectly referred to this as the version of accused no. 1 and that of the appellant.
- d. The magistrate ignored the discrepancies between the evidence of the complainant on the one side, and that presented by the police witness, that recorded in the appellant's affidavit, as well as that recorded on the medical examination form, stating for example that the complainant had told the doctor that she was raped by four men while a fifth man watched.
- e. The complainant testified that her cellular phone was taken but returned to her. According to the doctor's notes the phone was not returned. This discrepancy was also not addressed.

- f. The prosecution only sought to prove previous convictions with respect to accused nos 1 and 3, who admitted their criminal records. The magistrate initially found that it was accused nos 1 and 2 who had admitted previous convictions. During judgment on sentence the magistrate recorded that none of the accused had previous convictions.
- g. The magistrate found that no substantial and compelling circumstances existed to deviate from the mandatory sentence of life imprisonment.

In the same breath however, the trial court opined that life sentences would be “disproportionate” and sentenced the appellant and his erstwhile co-accused to 28 years’ imprisonment instead.[4]

[11] The appellant and his co-accused were sentenced on 11 November 2011. Leave to appeal against the convictions and the sentences imposed was refused.

[12] On 31 March 2017 the Mdantsane Magistrates’ Court noted receipt of the appellant’s petition to the Judge President of this Division for leave to appeal. On 4 June 2018 the petition served before Hartle J under cover of an evenly-dated note (with no addressee and sans any record) from Ms B. Jongolo, purportedly the clerk of the criminal court, which simply reads:

‘Please find record for the above mentioned case.’

[13] On 3 July 2018 Hartle J, quite properly, issued two directives: firstly, that the petition must be accompanied by an application for condonation; and secondly, that the regional court record and all exhibits filed at the trial should accompany the petition. On 16 October 2018 this court received an application for condonation (dated a week before), seeking an order in the following terms:

- a. that the late filing of the appellant’s petition be condoned;
- b. that he be granted leave to appeal to this court against both judgment and sentence;
- c. that the clerk of the Mdantsane criminal court should cause to be placed before this court a full transcript of the record and the judgment forming the subject matter of the appeal.

[14] The appellant’s affidavit in support of the condonation application reads as follows:

‘On the 31st March 2017 I was advised by my attorney Mr Mnyute that he had filed my Petition in the Mdantsane Court and that they will do what is necessary to get it before the High Court in Bhisho.

I waited long and I then decided to phone the East London Office of Legal Aid SA to obtain progress on my matter. I was advised that the Clerk of the Court in Mdantsane who is responsible for Appeal promised that she will get back about progress.

Each and every time I phoned I would be given the same feedback up until my family member intervened.

It was earlier this year wherein my sister was advised that the Clerk of the Court never processed my Petition and that she admitted erroneously filing it away as she was new in the section at that time she did not know what to do. I was advised further that she promised that she will request the record and process it as soon as possible.’

[15] These motion papers were accompanied by a confirmatory affidavit from the errant clerk. Copies of the papers were also forwarded to the registrar of the Bhisho High Court and to the deputy Director of Public Prosecutions (“the DPP”). At some stage thereafter two bundles of transcribed documents, a seven-page wadd of illegible manuscript notes, a form J88 and an affidavit were dumped in the high court file. I am unable to say when this happened as no acknowledgment of receipt is reflected.

[16] Some time thereafter, and in pursuance of a general witch hunt regarding files which had been collecting dust over unacceptably long periods in the general office of the Bhisho High Court, I stumbled upon the appellant’s petition file. This was in March 2019, after having been advised that the appellant had been phoning the general office every second day from prison to find out what had happened to his petition.[5] It transpired that nothing had been done to escalate the appellant’s petition for five months, notwithstanding these repetitive calls from the appellant and his family members. In particular, there was no indication that Hartle J’s directive had ever been transmitted by the clerk responsible.

[17] On 1 March 2019 I wrote a letter to the clerk of the Mdantsane criminal court, which was copied to the Mdantsane regional magistrate (Gixana Esq.), the head of the legal aid board (Ms Mtini) and the acting deputy DPP (Ms De Kock). The letter reads as follows:

‘1. The transcribed record of proceedings in question is rendered materially defective by the missing portions thereof to the extent that no meaningful consideration can be given to the petition.

2. The consideration of this petition is accordingly held in abeyance for the record of the proceedings to be supplemented.

3. The missing portion of the record appears to be the evidence of the erstwhile accused no. 3 and that of the petitioner Mr Mthetheleli Gabani who has been contacting the assistant registrar of this Court on a regular basis to find out what has happened to his matter.

4. If this missing portion cannot be transcribed it must be reconstructed. In *S v Leslie* 2000 (1) SACR 347 (W) the different approaches to the reconstruction of missing evidence are set out. It is not required that the record be perfect to allow for a proper consideration of the petition; it is sufficient that it be adequate for that purpose (see *S v Machaba & Another* 2016 (1) SACR 1 (SCA); *S v Schoombee & Another* 2017

(2) SACR 1 (CC) at [29].

5. To that end the reconstruction/supplementation should be done jointly, in open court, by the magistrate, the prosecutor, the petitioner, the interpreter and the legal representative, with a proper record of the reconstruction proceedings being kept.
6. The clerk of the magistrates' court is required to submit copies of the properly rectified/constructed record of the lower court proceedings to the High Court Registrar (Ms Menze), the Legal Aid Board (Ms Mtini) and the Acting Director of Public Prosecutions (Ms de Kock) before 29 March 2019, whereupon the petition will be considered.
7. The defective record is returned to the magistrates' court together with a copy of this letter. This problem was raised on 27 November 2018. No response was received. In the event of a full transcript/reconstruction of the missing portions not having reached this office before 29 March 2019, serious consideration will be given to setting the proceedings against the petitioner aside (see *S v Phakane* 2018 (1) SACR 300 (CC)).'

[18] Thereafter an office note was secured to the inside cover of the court file and a duplicate file was opened for tracing purposes. The note, for the attention of the high court appeals clerk, read thus:

'PRISONER CONVICTED 2011

There is no indication that the letter for the record to be transcribed was ever sent. I have asked D [my registrar] to do the draft I usually do when records are incomplete. It complies with the rules. You should keep one as a template. This file must be sent to the magistrates' court with that letter. The other [file] you must keep with the letter stapled to the inside cover for easy reference.

We will look at it again on 29 March 2019 (end of month).

PSE ENSURE THAT THE PRISONER GETS A COPY OF THIS LETTER ASAP'

[19] When it came to my attention that the letter had once again not been transmitted, my registrar personally sent a copy thereof to the deputy DPP as the State's representative, requesting that office to ensure that the letter made its way to the magistrate and the clerk of the lower court. After having enquired from the responsible high court clerk regarding progress, proof of transmission and the like, we were eventually furnished with the following trailing electronic mails which I have reproduced in their original form:

'From: Jongolo Bukiwe

Sent: 04 March 2019 10:04 AM

To:

Menze Fikiswa

Subject:

Hi Fiks

When reading this record its saying the defective record was returned to the Magistrate together with a copy of this letter, I want to know which Magistrate and was it delivered by post or given to the messenger?

Thanks

B Jongolo'

'From:

Fikiswa Menze

Sent: 04 March 2019 10:10 AM

To:

Jongolo Bukiwa; Menze Fikiswa

Subject: RE:

Hi cc

Will send the record to your office to your attention. The record is still with us.

Or is it possible to send one of your drivers to come and fetch the record because our driver is still at Mthatha but will be back today in the afternoon.

Thanx

Fikiswa Menze'

'From: Jongola Bukiwa

Sent: 04 March 2019 10:21 AM

To:

Fikiswa Menze

Subject: RE: RE:

okay'

Sent: Monday, 04 March 2019 10:50

To: Jongile Bukiwe

Ndicela undibekele stamp kula letter uphinde undithumelele plz dear'

[20] I accept that communication by way of electronic mail has by and large become the order of the day in our justice system. It does not however, mean that all caution should be thrown to the wind when it comes to form. Support staff at our courts should use a uniform formal

form of address in all written correspondence placed on court files, notwithstanding the use of electronic mail. Insofar as it may be necessary to explain what this means, a formal communication from the high court appeals clerk to the magistrates' court appeals clerk, should adhere to a business letter format which should look something like this:

'Appeals and Reviews

High Court

Private Bag X0003

BHISHO

5605

The Appeals and Reviews Clerk

Magistrates' Court

Private Bag X

MDANTSANE

XXXX

27 March 2020

Dear Ms Jongola

INCOMPLETE APPEAL RECORD: S v GABANI

YOUR REFERENCE RC 3/39/11

OUR REFERENCE CA&R 24/18

1. I refer to our letter to you dated 1 March 2020, a copy of which is annexed.
2. Despite the urgency of this matter, this office has still not received any acknowledgement of receipt or a response from you.
3. Kindly be advised that should no response be received by the end of March 2020, this matter will be finalised without further recourse to you.
4. Kindly acknowledge receipt of this electronic mail in writing.

Yours faithfully

Ms xxxxxxxxxx

Appeals and Reviews Clerk'

[21] Informal address, address in a language other than that formally accepted by the courts, acronyms and failures to describe addressees and the matters in sufficient detail, must be avoided at all cost. Regular follow up must be strictly adhered to and should be emphasised at all cost by those ostensibly training these officials. Any judicial officer or interested party having access to the court file should be placed in a position to establish the status quo and the history of a matter at first glance.

[22] Despite the contents of the aforesaid note and the clear instruction regarding the pending of the matter, the clerk in question failed to revert to me a month later as arranged, or at all. It was only after another entire year had gone by, that the clerk ventured to mention that the distressed appellant was still hounding her telephonically about the fate of his petition. As

my complaints about this distressingly irresponsible and dilatory conduct were effectively brushed under the carpet, I was constrained

to retain the file and absorb the duties of an administrative clerk myself. To that end I wrote an urgent letter on 5 March 2020 to the deputy DPP which reads thus:

‘Herewith a copy of my letter dated a year ago, and the shocking trailing mail emanating from the registrar’s office. I despair.

Please acknowledge receipt of the letter and record and see what you can do. The petitioner has served almost nine years already. There is no indication that the matter was sent to you, the magistrate or the legal aid board.

As the record stands there is, in my view, insufficient evidence against the petitioner. If there have been no developments by the end of March 2020, I will convene an urgent appeal court and consideration will be given to taking the Phakane route. I have no reason to disbelieve the petitioner’s explanation in his condonation application. Indeed, I empathise with him.’

[23] The very next day the deputy DPP acknowledged receipt of both the letter and the incomplete record, and undertook to resolve the matter and pend her file for 20 March

2020. Coincidentally, on 20 March 2020, the magistrates’ court clerk forwarded the following email to the high court clerk:

‘Good Fiks

I have given Ms Gixana[6] the correspondence that I received from Judge, she responded by saying that she has spoken with Mr Myute Legal Aid attorney for M. Gabani. He told him that they are not allowed to visit prison as he has to go and consult with Mr Gabani, He will inform Ms Gixana after he meet with Mr Gabani for the reconstruction of the record.

Regards

[24] By this stage this court had granted leave to appeal on the papers as they stood. To this end an urgent directive was issued on 25 March 2020 to be copied to all the previous role players including the acting head of Kirkwood Prison (Mr Patrick Jafta) where the appellant had been patiently waiting for the wheels of justice to show any semblance of movement at all. The letter reads as follows:

‘1. The petitioner is granted leave to appeal against his conviction and sentence on a charge of rape by the regional magistrate Ms Gixana Esq, at Mdantsane on 11 November 2011.

[1] The appeal will be heard by the full court sitting at Bhisho on 17 June 2020 at 09h30. Due to the complex history of this matter the petitioner must be requisitioned to attend court on that day.

[2] A copy of the incomplete record which was forwarded to Ms De Kock from the DPP’s office must be returned forthwith. In the interim the magistrate, the prosecutor and the petitioner must continue to make their best endeavours to reconstruct the record and return it directly to Ms D Matroos (registrar to Judge Stretch) with an explanation as to what endeavours, if any, have been made to effect the reconstruction,

by no later than 8 June 2020.

[3] The legal aid office and the DPP must ensure that the petitioner and the State are represented at the hearing. To that end the petitioner’s representative must file heads of argument directly with Ms D Matroos 15 court days before the hearing, and the DPP must do likewise, ten court days before.

[4] The petitioner must supplement his application for condonation by providing a full history of all the steps he has taken since 2018 in attempting to process this petition via the criminal clerks at Mdantsane Court and the Bhisho High Court. The supplemented affidavit must be filed directly with Ms D Matroos together with the petitioner’s heads of argument.

[5] The clerk of the Mdantsane magistrates’ court (Ms Jongolo) and the criminal court clerk at Bhisho High Court (Ms Menze) must file affidavits (if any) in response to the petitioner’s affidavit five court days before the hearing. These affidavits must deal with the following issues:

- (a) why no response was received from the Mdantsane court when this office first raised the problem of the defective record on 27 November 2018 and again on 1 March 2019 (see the attached correspondence);
- (b) why the defective record was not returned to the magistrates’ court on 1 March 2019 as per paragraph 7 of the attached instruction, or any time thereafter for that matter.

[25] For reasons unbeknown to me, this letter too, was not forwarded to the magistrate on the day on which it was dated, notwithstanding the fact that both the legal aid board and the prison had acknowledged immediate receipt on that day. The court file reflects:

(a) that the high court clerk only emailed the letter to one Mr Jama (whose designation and purpose is not reflected for the convenience or information of this court or for anyone else for that matter), on 18 May 2020;

(b) that Jama only forwarded the letter to the magistrate on 26 May 2020, more than a week later.

[26] Amongst these emails there does however appear one from “Gixana Bulelwa” (whom I presume was the trial magistrate) to one “Sivuyilem@legalaids.co.za” (occupation, role, identity and purpose undisclosed), stating:

‘Herewith the correspondence from the High Court.

Please revert so that we can make endeavours to reconstruct the record.’

[27] Despite the fact that this court had issued a formal directive to, inter alia, the trial magistrate on 25 March 2020, an informal email was once again sent to my registrar by Jongolo attaching a further informal email addressed by the trial magistrate to what appear to be clerks in the magistrates’ court, without the courtesy or composure of a formal response to the appeal court. It says this:

‘Good day

In response to your minute dated 18 05 2020 I wish to advise as follows;

1. The matter was finalised in 2011.
2. The four accused persons were represented by Mr Mnyute from the LAB Justice Centre East London.
3. On behalf of the state Mr L Gwentshe appeared and the matter was eventually finalised by the late Mr Majalisa.
4. In March I indicated to Ms Jongolo our clerk of the court responsible for appeals and reviews that Mr Mnyute had informed me that he was unable to consult with the appellant in prison due to the CORONA VIRUS PRISON VISITS SUSPENSIONS and the status quo remains to date.
5. The purpose of the visit was to bring to the attention of the appellant that (a) The present record does not reflect his testimony,
- (b) The attorney could not trace his file wherein his notes were kept, (c) The attorney could not recall the evidence of the appellant as this is an old matter, (d) To check whether the appellant could assist in that regard, (e) And if not whether the appellant had any issues with the summary of his testimony as reflected in the judgment by the presiding officer.
6. The prosecutor Mr Gwentshe also informed me that he had no luck locating the docket, let alone the notes compiled by both himself and the late Mr Majalisa.

7. I as the presiding officer could not find my notes anywhere.
 8. All the above circumstances prevented us from reconstructing the record.
 9. I am in no position to reconstruct the record and I humbly request the judge to decide the matter on the available record of proceedings.'
- [28] It is against this unfortunate background that the appeal was finally heard in open court. In my experience, it is not the norm for an appeal judgment to place issues of logistics and form such as these above the legal substance of the appeal. There is however, good reason for doing so. This court has experienced, over at least the past seven years, an accelerating decline in the loyalty of civil servants to perform their functions optimally, particularly those who have clerical job descriptions, and without whose executive and administrative output judges have literally been constrained to become registrars of obligation instead of paying attention to the rule of law and the application of the law and relevant legal principles to the case at hand. With many judges having become steeped in case flow management, which also has had the effect of detracting from the traditional role of a judge, support structure staff are becoming less and less inclined to carry their weight or to add value to the services which the Office of the Chief Justice must of needs be, offer to all members of the public in civil and criminal courts alike.
- [29] Perhaps an apposite example of why I say this, can be found in the irrelevant, inappropriate and disjointed respective responses of the responsible clerks to my invitation to deliver affidavits explaining their dilatory, disinterested and shoddy management of this matter, and their perceived lack of comprehension as to what is required of them.
- [30] The magistrates' court clerk, in true form of "pen-pal" type communication, addressed an email to my registrar which was copied to someone whose function and interest in the matter is once again not explained (and which appears to have been rushed out on the day of the appeal hearing in default of my invitation which called for it to be filed five days before), making the following irrelevant remarks, clearly indicative of this employee's lack of insight or understanding as to what she has

been tasked with as an appeals and reviews clerk:

'Good Morning

I had received a subpoena to attend today at the High Court in the matter of Mthetheleni Gabani and others as a witness, it is unfortunate that I cannot attend today's sitting as I had been in contact with a colleague that had tested positive for Covid – 19 last week I am there for in Quarantine at home and will be going for testing this week. I hope that I will be able to attend the next sitting as I will by then have received my results.

I once more apologise for my unavailability.

Ms B Jongolo'

[31] The affidavit of the high court clerk reads as follows:

'AFFIDAVIT

I, the undersigned

FIKISWA MENZE

Hereby do make oath and say:

1. The facts herein stated are within my knowledge and I am duly authorized to make this affidavit.
2. I am an adult female person and employed as a criminal court clerk at Bhisho High Court Eastern Cape Local Division situated at 10 Independence Avenue, Bhisho.
3. I confirm that on 05 June 2018, I received a court record under case number RC3/39/11 from Ms B Jongolo a clerk the criminal court at Mdantsane magistrate court. A copy of the correspondence is annexed hereto, marked "FM1".
4. I then handed the court record to the secretary of the senior Judge on the date and time as mentioned in paragraph 3 above.
5. I confirm further that on 01 March 2019 at about 04:13 pm I received an email as well as the attached correspondence addressed to the clerk of Mdantsane Criminal Court from Delene Matroos (Secretary to Judge Stretch) requesting same to be forwarded to the clerk of the criminal court at Mdantsane Magistrate Court. A copy of the email and the attached letter is annexed hereto, marked "FM2".
6. I immediately phoned Bukiwe Jongolo a clerk of the criminal court at Mdantsane Magistrate Court and requested her to urgently send a person to collect the abovementioned court record.
7. I forwarded the abovementioned correspondence through email to Bukiwe Jongolo and also asked her to put a date stamp as proof of service and to electronical email it back to me. A copy of the email and letter is annexed hereto, marked "FM2".
8. The defective court record under case no CA&R 24/2018 was collected by Mr Thembekile (the messenger from the Mdantsane Magistrate Court) and returned to the Mdantsane Magistrate court on the 14 March 2019. A copy of the register is annexed hereto, marked "FM3".
9. I further declare that neither the response was received from the Mdantsane Magistrate Court nor the record was returned to ourselves or reached our offices, after it was returned to Mdantsane Magistrate Court on the 14 March 2019.
10. It is my belief that the above mentioned record is still at Mdantsane Magistrate Court.

11. That this affidavit has been executed by me without any pressure or undue influence rather it is my sweet will and consent.'

[32] The "affidavit" does not deal with any of this court's concerns. It fails to explain why no follow up was done when the record was not returned by 29 March 2019 as stressed in the letter and with the clerk. It does not explain why no pending system was in place in the office of this clerk or in the general office of this court to address issues such as these, despite the value of a monthly or six-weekly pending system and the simple use of a diary, having been carefully explained

and repeatedly emphasised with staff members.

[33] These inordinate delays are not systemic. They are caused by nothing less than dereliction of duty. Almost nine years have passed since the appellant's application for leave to appeal was refused. It is not clear when thereafter his petition was lodged, but we do know that he was advised by his attorney no less than three and a half years ago that the petition had already been filed with the Mdantsane Magistrates' Court, where it lay unattended to for at least a year until a clerk at the magistrates' court admitted that she had filed it away as she did not know what to do with it. Notwithstanding the gravity of this error and the mounting urgency which it had created, it took another seven months for the petition to reach the high court, but woefully, without the record of the very proceedings which form the obvious subject matter of the petition.[7] The application for condonation duly arrived three months after it was called for.[8] The record did not. It is clear that no follow-up was made by the high court staff since Hartle J had called for the record on 3 July 2018. Once again the matter lay with the high court for almost a year during which period it was simply ignored. After the exposure of the next episode in the series of unfortunate events, the high court clerk too, simply ignored an instruction to pend the file for a month. Indeed, it was not pended at all, despite the warning that 29 March 2019 would be the cut-off date for reconstruction or supplementation of the record. It was only a year later that the matter appears to have been resurrected quite by coincidence.

[34] The inescapable inference in these circumstances is that magistrates' court and high court staff whose very task it is to ensure that this does not happen, have been directly responsible for at least four years' delay in finalisation of this matter. To my mind this is wholly unacceptable and a severe indictment on the justice system as a whole, but more particularly on judicial officers, who are invariably ultimately held accountable for all and any miscarriages of justice that occur in this system.

[35] I say this for a number of reasons. The appellant's rights to have access to the courts, to challenge evidence and to appeal (and for all this to happen without unreasonable delay), are enshrined in section 35 of our Constitution. On 14 February 2014 Chief Justice Mogoeng Mogoeng released certain norms and standards applicable to the exercise of judicial functions in all courts. The objectives of these norms and standards are described as follows:

‘OBJECTIVES

These norms and standards seek to achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable. These objectives can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law.

...

MONITORING AND IMPLEMENTATION

Everything reasonably possible should be done to ensure that Judicial Officers have all the resources (emphasis added) and tools of trade available to enable them to perform their judicial functions efficiently and effectively.’

[36] It is to this end, and in striving to fulfil the objectives set forth in this tablet of norms and standards traversing the duties of judicial officers, that it is necessary from time to time to be transparent and address those delays which frustrate and constrain judicial officers in these very duties.

[37] A “judge” is defined in the Concise Oxford English Dictionary as

‘... a public officer appointed to decide cases in a law court.’

The word “judicial” is defined as

‘... relating to the administration of justice; ... of or appropriate to a law court of a judge.’

[38] To my mind administrative clerks who are employed at the law courts are no less judicial officers than judges and magistrates when it comes to the carrying out of the functions and duties assigned to them in order to ensure that justice is seen to be done. The governance and administration of courts is dealt with in ss 8 to 11 of the Superior Courts Act 10 of 2013. Section 8 reads as follows:

‘8 Judicial management of judicial functions

- (1) For the purpose of any consultation regarding any matter referred to in this section, the Chief Justice may convene any forum of judicial officers that he or she deems appropriate.
- (2) The Chief Justice, as the head of the judiciary as contemplated in section 165(6) of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.
- (3) The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers –

- (a) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and
 - (b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts (emphasis added).
- (4)
- (a) Any function or any power in terms of this section, vesting in the Chief Justice or any other head of court, may be delegated to any other judicial officer of the court in question.
 - (b) The management of the judicial functions of each court is the responsibility of the head of that court.
 - (c) Subject to subsections (2) and (3), the Judge President of a Division is also responsible for the co-ordination of judicial functions of all Magistrates' Courts falling within the jurisdiction of that Division.
- (5) Any protocol or directive in terms of subsection (3) –
- (a) may only be issued by the Chief Justice if it enjoys the majority support of the heads of those courts on which it would be applicable; and
 - (b) must be published in the Gazette.
- (6) The judicial functions referred to in subsection (2) and subsection (4)(b) include the –
- (a) determination of sittings of specific courts;
 - (b) assignment of judicial officers to sittings;
 - (c) assignment of cases and other judicial duties to judicial officers;
 - (d) determination of the sitting schedules and places of sittings for judicial officers;
 - (e) management of procedures to be adhered to in respect of –
 - (i) case flow management;
 - (ii) the finalisation of any matter before a judicial officer, including any outstanding judgment, decision or order; and
 - (iii) recesses of Superior Courts.
- (7) The Chief Justice may designate any judge to assist him or her in his or her judicial leadership functions.'
- [39] The norms and standards are at best designed for judicial officers to manage the judicial functions set out in section 8(6) of the Superior Courts Act and s 165 of the Constitution. For the rest, judicial officers are heavily dependent on the court staff component to carry out their duties competently and reliably.

[40] In *Nkabinde v Judicial Service Commission*,^[9] the SCA, in commenting on the place of a judge and the proper image of the judiciary in a constitutional democracy, referred to a decision of the Canadian Supreme Court^[10], adding that the position of a Canadian judge is equally applicable in our country. The relevant portion of the judgment reads thus:

‘108. The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its

judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties,

judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the Canadian Charter, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies ... Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

109. If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also

play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them ...

110. Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

“Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or unfounded criticism, or the simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public

respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment.”

[41] The upshot of this line is that when it comes to the protection and advancement of human rights and the rights of the individual, the proverbial buck stops with the judicial officer who is at the coalface. It stops with judges and magistrates. At the end of the day it is invariably

magistrates and judges who are taken to task in the media and by bodies such as the judicial service commission when there are complaints that justice has been delayed or denied.

When the Office of the Chief Justice was established by the President of the Republic of South Africa on 23 August 2010, its vision was recorded to have been that of a single, transformed and independent judicial system which would guarantee access to justice

for all. Its mission? To provide support to the judiciary to ensure effective and efficient court administration services.

[41] The case at hand is but one of many where the administrative support for the judiciary has floundered. The situation does not seem to be improving. In my respectful view, the time is ripe for the efficiency and effectiveness of our administrative support structure to be addressed in a manner which is designed to uplift, empower and educate the administrative arm of our courts to the level of a foundation upon which the norms and standards of judicial officers can safely rely in a symbiotic relationship designed to enhance judicial service delivery.

[42] As far as the substance of the appeal itself is concerned, we are in agreement on the record as it stands, that the appeal serves to be upheld, and that the trial proceedings relating to the appellant, as well as the conviction and the sentence of the appellant by the trial court must be set aside. This much has been conceded by the respondent. That was accordingly our unanimous finding when a special appeal court was convened on 17 June 2020. The appellant was released from custody forthwith. That it has taken this long for this court to have been placed in a position to make this finding is regrettable.

[43] It is directed that copies of this judgment be made available to the following parties for their consideration:

- a. The Registrar and the Court Manager of the Bhisho High Court.
- b. The Deputy Director General Court Services, Pretoria and the Regional Head, Department of Justice, Eastern Cape.
- c. The appellant's legal representative, for onward transmission to the appellant.

I.T. STRETCH

JUDGE OF THE HIGH COURT

I agree:

M.S. RUGUNANAN

M.S. DUNYWA

ACTING JUDGE OF THE HIGH COURT

Date of hearing and granting of order: 17 June 2020

Date of judgment: 7 September 2020

For the appellant: N.P. Mtini

Legal Aid South Africa

Justice Centre

KING WILLIAMS TOWN

For the respondent: N. Tokota

National Prosecuting Authority South Africa

Deputy Director of Public Prosecutions

[1] Accused nos 1 and 3 were also forensically linked to the complainant by way of DNA.

[2] This seating arrangement was confirmed by accused no. 2 when he testified.

[3] A police witness for the prosecution confirmed that the complainant had told her that there were five men, that two were

seated in the front and that she was in the back with the other three. Significantly, this witness also stated that the complainant

had told her a third version, namely that accused no. 3 went off to buy cigarettes with the appellant after she had only been raped by the appellant, and no one else, and that she was left behind with three of the five males, as the appellant and accused no. 3 did not return.

[4] Which, for the appellant, who was 28 at the time, would effectively have meant imprisonment for life in any event.

[5] During the course of investigations it soon became apparent that many of the incumbents of clerical positions in the administrative staff component of the high court were either under-qualified and poorly trained, or were simply incompetent and disinterested in taking their duties as the executive arm of the high court seriously. I engaged in an intensive and time-consuming training programme which involved a great deal of repetition (as many of the incumbents of the posts were simply out of their depth), transparency, regular reporting and supervision.

[6] Ms Gixana was the magistrate in the trial court. By then courts were preparing for the COVID 19 lock down, scheduled for 24h00 on 26 March 2020.

[7] It must be noted that Mdantsane Magistrates' Court is literally a stone's throw away from the Bhisho High Court. It would have taken a messenger no longer than 15 minutes to deliver the petition by hand, once the inordinate delay had been exposed.

[8] Insofar as this Court's order setting the proceedings aside on 17 June 2020 did not reflect that condonation had been granted, this judgment records that it was, and that the application therefor was in any event not opposed for obvious reasons.

[9] 2016

(4) SA 1 (SCA) [5] (footnotes omitted and emphasis added)

[10] Therrien (Re) 2001 SCC 35 (84 CRR (2d) 1)

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