

SOUTH AFRICA / JUDGMENT

Khaka and Another v S (CA 27/2023) [2024] ZANWHC 64; 2024 (2) SACR 86 (NWM) (8 March 2024) [2024] ZANWHC 64

COURT

North West High Court, Mafikeng

BEFORE

Hendricks JP, Scholtz AJ

CASE / FILE NUMBER

CA 27/2023

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA 27/2023

Reportable

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to Regional Magistrates

In

the matter between:

JOHN

KHAKA

First

Appellant

TSHEPO

KHAKA

Second

Appellant

and

THE

STATE

Respondent

CORAM: HENDRICKS JP et SCHOLTZ AJ
DATE
OF HEARING: 01 MARCH 2024
DATE
OF JUDGMENT: 08 MARCH 2024
FOR
THE APPELLANT /DEFENDANT: ADV. KEKANA
FOR
THE RESPONDENT/PLAINITFF: ADV. ZAZO

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00am on 08 March 2024.

ORDER

Resultantly, the following order is made:

- (i) The appeal against both convictions and sentences in respect of both appellants is upheld.
- (ii) The convictions and sentences of both the appellants on all counts are set aside.
- (iii) The appellants are to be released from custody with immediate effect.

HENDRICKS JP

Introduction

- [1] The two appellants were arraigned in the Regional Court, Stilfontein and charged inter alia with murder. They were convicted inter alia on the murder charge and sentenced to twenty (20) years imprisonment each. They applied for leave to appeal from the trial court, which was refused. They successfully petitioned the High Court against their conviction and sentence, inter alia on the murder charge; hence the present appeal. One of the grounds of appeal is that insofar as the murder count is concerned, "a point of law is taken that the Honourable trial court did not comply with the provisions of section 93 ter of the Magistrates' Court Act 32 of 1944(MCA) [as amended]. The trial proceeded without assessors in circumstances where it cannot be said that such was requested by appellants."
- [2] It is prudent to verbatim quote from the record what transpired in the court a quo with regard to this aspect. The record reads thus:

"Ekskuus tog Mev. Mohammed sonder assessore die vehoor?"

To which Ms. Mohammed, the legal representative of the appellants, reply:

"... Furthermore Your Worship I confirm that the trial proceed without assessors."

This forms the nub of the point of law raised as a ground of appeal. It is alleged that the aforementioned does not comply with the dictates of Section 93 ter of the MCA.

[3] Mr. Kekana, who appears on behalf of the appellants in this appeal before this Court, states in his heads of argument under the heading “Point in Limine Raised” the following:

“5.1. The honourable trial court did not comply with the provisions of section 93 ter (1) of the Magistrate Court Act 32 of 1944 in that the court only asked the then attorney for appellants Ms Mahommed, if the trial proceeds without assessors to which she confirmed same but there is nothing on record to show that appellants were aware of their rights to have assessors sitting with the Regional court magistrate in the trial and that they requested that the trial proceed without same and the answer from Ms Mohammed was not confirmed by the appellants. There was no interaction with appellants at all either from the court or their attorney.

5.2 Accordingly, appellants could not be said to have requested the trial to proceed without assessors and this constitutes an irregularity which vitiates the proceedings and the conviction should therefore, be set aside.

5.3 In *Director of Public Prosecutions, KwaZulu-Natal v Pillay* (706/2022) [2023] ZASCA 105 (23 June 2023), the court held that compliance with section 93 ter (1) of the MCA is a fact-based enquiry. In light of this, is equally undesirable to lay down a general rule regarding what must be done to establish compliance with the section.

5.4 However, in paragraph 35 supra the court held "where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with section 93 ter (1). As indicated in *Gaiya*, the presiding officer must take the lead in doing so at a stage before any evidence is led."

5.5 The Learned Regional court magistrate failed to establish whether the appellants were aware of the provisions of the section. His question to Ms Mohammed was intended for Ms Mohammed to rubber-stamp a decision already reached by the court."

[4] In opposition, Adv. Zazo on behalf of the respondent (State), contended:

“3. What transpired at the beginning of the trial is that the court asked the accused's legal representative to confirm if the trial will be proceeding without assessors, to which the legal representative responded: 'Your worship I confirm that the trial proceed without assessors'. Record 129 lines 10-11

4. The more recent decision of the Supreme Court of Appeal in *DPP KwaZulu-Natal v Pillay* (706/2022) [2023] ZASCA 105 (23 June 2023) resolved and settled the confusion that had been caused over the years by the differing High Court judgments in interpreting the principles laid down in *S v Gaiya* [2016] ZASCA 65 regarding the application of section 93ter of the Magistrates' Court Act 32 of 1944 (the MCA).

5. The Gayiya case had been misunderstood and misinterpreted to mean that section 93ter obliged the presiding officer to address an accused person directly, and to explain the ambit and effect of the provision to an accused person without reference to their legal representative, which is not the case.

6. However, as it stands currently, the approach endorsed by the Supreme Court of Appeal as reflected in the Pillay case is as follows:

“Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person's constitutional rights are protected. But that general obligation is to be carried out in the light of the accused having exercised the right to legal representation.”

7. In light of this, it is accepted that where an accused is legally represented, it is not necessary for the presiding officer 'to

explain in detail each and every single one of his numerous constitutional rights' 2 The fact that the court did not enquire directly from the legally represented accused on whether the trial was to proceed with or without assessors, cannot qualify as an irregularity and it does not vitiate the proceedings.

8. The Respondent therefore submits that by enquiring from the accused's legal representative, whom the court correctly expected to have consulted with the accused, to explain what the provision entails and to determine what the best approach was for the defence, the court thus complied with the requirements of section 93ter of the MCA.”

[5] To reiterate, his ground of appeal is predicated on an alleged failure by the Regional Magistrate to comply with the provisions of section 93 ter of the MCA, which is a question of law as envisaged in section 309 (2) of the Criminal Procedure Act (CPA) 51 of 1977, as amended, which provides that the power of the Provincial or Local Division on appeal, is as follows:

“The provincial or local division concerned shall thereupon have the powers referred to in section 304(2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in

favour of the appellant, no conviction or sentence shall be reversed or altered by reason of an irregularity of or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.”

This Court, in accordance with section 309 (2) of the CPA, is therefore constrained to consider the appeal solely on the question of law raised on the interpretation of section 93 ter (1) of the MCA.

- [6] This Court produced a number of judgments with regard to section 93ter of the MCA. One such judgment is that of *Evodia Monyapheng vs The State*, CA 08/2023, penned by Petersen J with Dewrance AJ concurring, handed down on 16 February 2024. I will quote extensively from this judgment, in which the following is stated:

“[11] As alluded to supra, the only ground of appeal against conviction is a technical attack on the conviction predicated on an alleged failure by the Regional

Magistrate to comply with the provisions of section 93ter of the MCA, on the basis that Regional Magistrate was not assisted by two assessors during the trial – the question of law. Section 93ter(1) (a) provides that:

“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.’

(emphasis added)

- [12] In the last two decades the interpretation of section 93ter(1) of the MCA has engaged our High Courts and the Supreme Court of Appeal on a regular basis. The most recent case being *Director of Public Prosecutions, KwaZulu-Natal v Pillay* 2023 (2) SACR 254 (SCA). I turn to discuss these authorities.

- [13] The genesis of or catalyst for all the authorities on section 93ter(1) of the MCA is the Supreme Court of Appeal judgment in *S v Gayiya*. The decisions in this Division are predicated in the main on *Gayiya*. The Supreme Court of Appeal re-affirmed the decision of *Gayiya* in *S v Mntambo* 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 Gayiya, 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 *Gaiya*. She stated:

‘In *S v Gaiya* 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.’”

(emphasis added)

[14] In *DPP, KZN v Pillay* the Supreme Court of Appeal gave further clarity on the decision in *Gaiya* in drawing, inter alia, a distinction between an unrepresented accused and an accused who is legally represented when dealing with section 93ter(1) and the importance of a vigilant examination of the record in this regard. The following extracts from *DPP, KZN v Pillay* are apposite and quoted extensively, to appreciate the peculiar position relevant to the present appeal:

“[2] The appeal was prosecuted on the basis that it raises a question of law, namely the proper interpretation and application of s 93 ter (1)

of the Magistrates’ Courts Act 32 of 1944 (the MCA). The respondent rightly conceded that the issue in this matter raises a question of law.

[10] Since the *Gaiya* judgment, numerous High Court judgments have addressed s 93ter(1) of the MCA and sought to apply *Gaiya*. Some conflict in the interpretation and application of *Gaiya* has emerged. In the light of this, it is necessary to resolve the conflict.

[24] This brings me to the judgment in the matter under appeal. In this instance the High Court was aware of the judgment in *Ngomane*. It did not, however, engage with the conflict in approach between *Ngomane* and *Langalitshoni*. Instead, it asserted that –

‘(i)n Ngomane the court appears to have entirely overlooked that in Gayiya the accused was also legally represented, and Mpati P clearly stated that the accused must be informed by the presiding officer at the trial that by law he or she is required to be tried in the presence of assessors. Accordingly, the issue of assessors is canvassed with the accused and that communication should appear in the record.’

[25] The High Court then considered Nxumalo, accepting that it endorsed Langalitshoni. It found on the facts that the respondents were not informed of the right to be tried in the presence of assessors. It concluded

that, on the facts, the case was on all fours with Nxumalo and that it was bound by that

judgment.

[26] The High Court’s perfunctory treatment of Ngomane on the basis that the court had overlooked the fact that, in Gayiya, the accused was represented, is unfortunate. It is also wrong. In Gayiya the accused was not represented at the stage that the trial court dealt with s 93ter...

[27] The High Court’s error caused it to construe Gayiya as laying down a principle that the presiding officer is obliged to address an accused person directly, and to explain the ambit and effect of s 93ter(1) to an accused person without reference to their legal representative. Gayiya did not lay down such principle...The judgment in Gayiya requires only that the magistrate presiding at the trial bring to the attention of an accused person the provisions of s 93ter(1) and establishes whether the accused has made a request to proceed without assessors. In the event that the accused makes such request, the magistrate may exercise a discretion regarding the appointment of assessors.

[28] It is necessary to say something about the request which may be made by an accused. The court in Langalitshoni construed s 93ter(1) as conferring upon an accused person a right to be tried by a ‘fully’

or ‘properly’ constituted court, namely a court including assessors. It held that the

election not to do so amounts to a waiver of the right, which can only occur if the accused is fully cognisant of their rights. Other courts, as indicated, have also used the words ‘election’ and ‘waiver’ to characterise the request.

[29] Section 93ter(1) deals, as this court has held, with the constitution of the court. It regulates the criminal jurisdiction of a regional court. The section permits the involvement of persons, in addition to appointed judicial officers, in the adjudication of criminal matters within the jurisdiction of a magistrates’ court. It does so on a discretionary basis by way of an election made by the presiding judicial officer, except in the case of a murder charge. In the latter case, the section provides for the peremptory involvement of assessors to assist the presiding judicial officer. In both instances, the participation of the assessors is delineated, and provision is made for disqualification, recusal and the continuation of the

trial without an assessor.

- [30] Section 93ter (1) does not confer upon an accused person a right to be tried by a ‘properly constituted’ court. The language employed in s 93ter(1) confers only a right to request that the trial proceed without assessors. The request is not dispositive. Once the request is made, the magistrate has a discretion to summon one or two assessors to assist them, notwithstanding the request. The fact that the court has a discretion to summon assessors, despite the request, effectively negates the notion of any kind of ‘election’ by the accused.
- [31] What s 93ter(1) requires is that an accused person must be informed of the section’s mandatory provisions and that he may request that the trial proceed without assessors. Gayiya does not hold that the magistrate is obliged to only address the accused directly, or to explain the nature of the rights conferred by the section...
- [32] Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person’s constitutional rights are protected. But that general obligation is to be carried out in the light of the accused having exercised the right to legal representation. Section 25(3)(f) of the Constitution confers upon an accused person the right to choose and be represented by a legal practitioner. In *S v Mpongoshe* this court held that s 73(2) of the CPA confers upon an accused the wider right to be represented. In that case it was held that the right to legal representation encompassed the right to have a plea tendered vicariously by the legal representative.
- [33] In *Beyers v Director of Public Prosecutions, Western Cape and Others*, it was held that:
- ‘The idea of being represented by a legal adviser cannot simply mean having somebody stand next to you to speak on your behalf. Representation entails that the legal adviser will act in your best interest, will represent you, will say everything that needs to be said in your favour, and will call such evidence as is justified by the circumstances in order to put the best case possible before the court in your defence.’
- [34] ‘Representation’ in this sense is not confined to the conduct of the trial. A legal representative, who is engaged to represent an accused, is obliged to act in the best interests of their client. That means,
- inter alia, to act according to the highest standards of professional ethics; to advise the client of their rights fully and properly; and to guide and advise the client in exercising those rights. The legal representative must prepare thoroughly and properly on all aspects of the case. This includes advising the client about s 93ter(1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors.
- [35] A presiding officer must, in the first instance, respect an accused person’s choice of legal representative and must defer to the legal representative’s conduct of the matter. These are general principles which are well

established. They inform our adversarial system of trial adjudication. It is against this backdrop that the duties of a trial magistrate must be viewed. Where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with s 93ter(1). As indicated in Gayiya, the presiding officer must take the lead in doing so at the stage before any evidence is led.

[36] The approach regarding the intended reliance upon prescribed minimum sentences, as provided by s 51 of Act 105 of 1997, is instructive. In *S v Legoa* it was held that the concept of substantive fairness under the Constitution requires that an accused be informed of facts which the state intends to prove to bring him within the increased sentencing jurisdiction provided by that Act. The court declined to lay down a general rule regarding the form of notice. It held that: ‘Whether the accused’s substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.’

[37] In *S v Kolea* this court reaffirmed the principle in *Legoa*. It also endorsed the approach set out by Ponnann JA in a minority judgment in *S v Mashinini and Another*, where the learned judge stated that the fair-trial enquiry is first and foremost a fact-based enquiry. The court in *Kolea* held that the conclusion to which the majority had come was wrong.

[38] Although we are not here dealing with a fair-trial enquiry, compliance with s 93ter(1) of the MCA is no less a fact-based enquiry. In light of this, it is equally undesirable to lay down a general rule regarding what must be done to establish compliance with the section. The set of guidelines proffered in *Langalitshoni* strays into this terrain. The requirements are at odds with the notion of a right to legal representation. They are also premised upon a misconception of the nature of the right conferred by s

93ter(1) and the application of principles of waiver.

[39] The High Court concluded that the respondent’s right was not explained to him. Before this court, counsel for the respondent

contended that whatever had occurred at the pretrial remand proceedings was irrelevant, since it was the trial magistrate

who was obliged to explain and act in accordance with the section. The argument is without substance. The purpose of the pretrial conference is to ensure that the enrolled case is ready to proceed to trial. Such pretrial proceedings are not to be ignored.

[40] The notes made by the magistrate presiding at the pretrial remand hearing state that the provisions of the section were explained to the accused. They were understood. The legal representative said that the

two accused did not require assessors. This was plainly a request that the trial proceed without assessors. The accused confirmed this to be so. Thus, when the trial magistrate asked the legal representative whether that was still the case, he sought to confirm the request.

[41] On the facts, s 93ter(1) was complied with. The High Court ignored the facts as disclosed on the record. In the circumstances, the High Court erred both in respect of the law relating to the section and in its application to the facts. It follows that the appeal must succeed...”

[7] As stated in paragraph [2], supra, the only interaction that the trial court had with the legal representative of the appellants, were the question posed:

“Ekskuus tog Mev Mohammed sonder assesore die verhoor?”

to which Mrs. Mohammed, the legal representative, responded:

“Furthermore Your Worship I confirm that the trial proceed without assessors.”

The question that arises is whether this was sufficient to establish a fact-based enquiry as enunciated in DPP, KZN v Pillay, supra.

[8] The quotation from the Monyapheng judgment continues:

“[20] In DPP KZN v Pillay, the SCA stated it is undesirable to lay down a general rule regarding what must be done to establish compliance with the section. A value judgment, having regard to the peculiar facts of each matter is therefore required, avoiding a one size fits all approach.

[21] The pre-trial conference in DPP KZN v Pillay is distinguishable from the present matter in that:

“The notes made by the magistrate presiding at the pretrial remand hearing state that the provisions of the section were explained to the accused. They were understood. The legal representative said that the two accused did not require assessors. This was plainly a request that the trial proceed without assessors. The accused confirmed this to be so. Thus, when the trial magistrate asked the legal representative whether that was still the case, he sought to confirm the request.”

In the present matter, the only recordal about assessors at the pre-trial conference attributed to Mr Sekgopolo is “Assessors not required.” There was no further engagement on the issue by the Regional Magistrate with Mr Sekgopolo.

[22] As DPP KZN v Pillay re-iterates with reference to Gayiya, is that what is required is that the magistrate presiding at the trial bring to the attention of the accused what section 93ter(1) requires, that being that he may request that the trial proceed without assessors, and that where the accused is legally represented that such legal representative, who is obliged to act in the best interests of their client, advise the client of their rights fully and properly; and to guide the client in exercising those rights which includes advising the client about s 93ter(1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors. Very importantly, DPP KZN v Pillay postulates that “Where an accused is represented, it must be established that the representative and the accused were

aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with s93ter(1). As indicated in Gayiya, the presiding officer must take the lead in doing so at the stage before any evidence is led.”

- [9] I am of the view that in the present matter the Learned Magistrate did not conduct a fact-based enquiry to establish whether the appellants knew about section 93 ter, and whether they would request that the trial court sit without assessors. It was not sufficient for the Regional Magistrate to merely ask the legal representative in the manner that she did:

This is woefully short of what is expected of a Regional Magistrate insofar as section 93 ter is concerned. I am of the view that there was no proper enquiry held to determine whether the appellants were apprised of their rights in terms of section 93 ter of the CPA, by the legal representative Ms. Mohammed, and that they understood same, so as to instruct Ms. Mohammed to waive those rights. The effect of not complying with the dictates of section 93 ter in line with DPP, KZN v Pillay, supra, is that the court was not properly constituted and the conviction and sentence as in Gayiya, Shange and Mntambo cases are to be set aside. It is totally insufficient to merely ask the legal representative.

“... without assessors this trial?”

- [10] In the final analysis, I am of the considered view that because of the fatal irregularity committed by the trial court, which vitiates the whole proceedings, the convictions and sentences imposed on both the appellants must be set aside. The appellants applications to be admitted to bail pending appeal was refused on 29 August 2023 and they are currently in custody. Because of the setting aside of their convictions and sentences in respect of all counts, they must forthwith be released from prison.

Order

- [11] Resultantly, the following order is made:

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

H SCHOLTZ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

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