

SOUTH AFRICA / JUDGMENT

# Mabe v S (A45/2022) [2022] ZAFSHC 175 (20 July 2022)

[2022] ZAFSHC 175

## COURT

Free State High Court, Bloemfontein

## BEFORE

Naidoo, Mhlambi

## CASE / FILE NUMBER

A45/2022

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## Source record

IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

CASE

NO: A45/2022

Reportable:

NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: NO

In

the matter between:

MASTER

LETSIETSA MABE

APPELLANT

and

THE

STATE

RESPONDENT

HEARD

ON:

18

JULY

CORAM: NAIDOO,

J et MHLAMBI, J

## JUDGMENT

BY:

MHLAMBI, J

DELIVERED ON: 20 JULY 2022

- [1] The appellant was convicted of murder in the Regional Court at Sasolburg on 19 July 2019 and sentenced to 15 years' imprisonment on 22 July 2019. Leave to appeal the conviction and sentence was refused on 30 June 2020. He petitioned the High Court and leave to appeal against both the conviction and sentence was granted on 10 November 2021.
- [2] The appellant has, in the heads of argument and in this court, raised a challenge that there was non-compliance with the provisions of section 93ter (1) of the Magistrates' Court Act No 32 of 1944, (the Act), in that the magistrate failed to ask the appellant or his lawyer whether the appellant waived his right that assessors be appointed to sit with the magistrate during the trial. It was contended that neither the typed nor the handwritten record reflected whether the court a quo explained the relevant provisions to the appellant and required him to elect whether the trial should proceed with or without the assessors. This, it was argued, was tantamount to a misdirection by the magistrate which vitiated the proceedings. Consequently, both the conviction and sentence should automatically be set aside.
- [3] The respondent opposed the application and contended that the record reflected that the court a quo complied with the provisions of section 93ter
- (1) of the Act.[1] The respondent, relying on the written record,[2] contended that the prosecutor, prior to the commencement of the trial, mentioned during the application for leave to appeal that the issue of the appointment of the assessors was raised. It was crucial to note, therefore, that this issue was raised neither at the commencement of the trial nor during the application for leave to appeal.[3] It was contended that the main reason why the issue was not raised by the appellant's legal representatives, was "that the matter was canvassed to the defence (accused and his legal representative)."[4]
- [4] The respondent submitted that, as there was no entry of the explanation of the relevant provision and no dispute raised by the appellant's legal representative when the issue was raised by the prosecutor, it was evident that the court a quo dealt with this issue at some stage before the commencement of the trial.[5]
- [5] For the sake of completeness, it is appropriate to quote page 387 of the record which reads as follows:

*"...in fact the court explained first and then asked whether do, asked whether do we need the assistance of assessors, Your worship?"*

Court: Mm

Prosecutor: And the advocate Sonchi said no, we can proceed, he does not, the accused was warned before we started, even if it is not on record,

Your Worship. The accused was warned by court, and even it was asked whether do we need assessors proceed with this matter. It was said that, advocate Sonchi said, yes, it was explained and court went further to explain again to the accused before court, Your Worship.

Court: Mm

Prosecutor: And then that is, thereafter we started with the case. Your Worship. So, I do not know whether that part was captured on record.

Court: Or not?

Prosecutor: Or does not form part of record, Your Worship.

Court: No, I have not seen the record, ... [indistinct] [intervenes]

Prosecutor: Because the, the thing that makes me to remember, so vividly with this case, this is, this was my first case with advocate Sonchi, in regional court, Your Worship, and thereafter we spoke about it a lot."

[6] Section 93ter (1) of the Act provides as follows:

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; or
  - b. in considering a community-based punishment in respect of any person who has been convicted of any offence, 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."

[7] In *Gaiya v S* it was stated:

*"[8] 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.”[6]*

[8] In *Mntambo v S*, [7] Weiner AJA stated that :

*“[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.”*

[9] It is clear in the present matter that the court a quo failed to afford the appellant the opportunity to decide whether to request that the trial proceed with or without assessors before he was asked to plead. That the matter was canvassed with the accused and/or his legal representative does not exonerate the presiding

officer from complying with the section and its underlying purpose. Despite the prosecutor’s contention that the court a quo complied with the provisions of section 93ter of the Act, the presiding officer failed to investigate the prosecutor’s contentions and to ascertain from the court record

whether she had done so or not.[8] The record does not show that the appellant requested that the trial proceed without assessors or that the assessors were summoned to be of assistance at the trial of the case in compliance with the section. Thus there is no record that the appellant waived his right to the appointment of the assessors. This misdirection is fatal and vitiates the proceedings.

[10] In the circumstances, the appeal must succeed. I therefore make the following order:

Order:

1. The appeal is upheld and the conviction and sentence are set aside.
2. The appellant is to be released from custody with immediate effect.

MHLAMBI J

I concur.

NAIDOO J

On behalf of appellant: Adv R Van Wyk

Instructed by:

Vermaak & Siecker Attorneys

C/O Adriaan Janse Van Rensburg Attorneys

07 Collinsweg. 2nd Floor Linde Street

Bloemfontein

On behalf of respondent: Adv. T Sekhonyana

Instructed by:

The Office of the DPP

BLOEMFONTEIN

- [1] Para 2.2 of the respondent's heads of argument.
- [2] Lines 3-8 on page 387.
- [3] Para 2.4 of the respondent's heads of argument
- [4] Para 2.5 of the respondent's heads of argument.
- [5] Para 2.6 of the respondent's heads of argument.
- [6] 2016(2) SACR 165 (SCA).
- [7] Edward Mntambo vs. The State (Case no 478/2020) [2021] ZASCA (11 March 2021).
- [8] Line 22 of the court record shows that the presiding officer never saw the record as she stated that: "No, I have not seen the record,...".

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