

SOUTH AFRICA / JUDGMENT

Mosiane v S (Appeal) (CA45/2024)

[2025] ZANWHC 91 (29 May 2025)

[2025] ZANWHC 91

COURT

North West High Court, Mafikeng

BEFORE

N Morej, R D Hendricks

CASE / FILE NUMBER

CA45/2024

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA45/2024

Reportable:

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

the matter between:

ATLHOLANANG
WILLIAM MOSIANE
Appellant
And
THE
STATE
Respondent

JUDGMENT**Judgment**

is handed down electronically by distribution to the party's legal representative by email. The date the Judgment is deemed to be handed down is 29 May 2025.

MOREI AJ:

1.

Introduction:

1.1. The appellant stood trial on 26 August 2022 in the Regional Court for the Regional Division of North West, (sitting at Tlhabane), on the charges of murder, in terms of section 51 (1) of the Criminal Law Amendment Act 105 of 1997, which attracts the imposition of a mandatory sentence prescribed by law. On the 26 August 2022 the charge was put to the accused and the accused pleaded guilty to the charge, which was initially preferred in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997. Upon the court not being satisfied about the appellants statement in terms of section 112(2) of the Criminal Procedure Act, it subsequently entered a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1997, as amended.

1.2. The matter proceeded on 30 September 2022 on which date the State made an application to amend the charge to read that the provisions of section 51(1) of Criminal Law Amendment Act finds application. The Appellant was found guilty by the Regional Magistrate, Mr Moeng. On the 1st November 2023 he was sentenced to life imprisonment. The appellant was throughout the trial legally represented by Mr Ngwenya.

1.3. The interests of justice demand that the appellant be advised promptly of the applicability of the prescribed minimum sentence, where the prescribed minimum sentence is applicable.

1.4. During the pre-trial conference, the minimum sentence and competent verdicts were not entertained. This is reflected from pre-trial conference records dated 21 June 2022 and 8 July 2022 respectively. Despite the pre-trial pro forma indicating that the minimum sentence and competent verdicts were explained to the appellant.

2. Condonation

2.1. The appellant failed to prosecute the appeal timeously and filed an application for condonation for the late filing of the appeal accompanied by an affidavit in support of the application. The application for condonation for the late filing of the appeal was granted.

2.2. Grounds of Appeal

The grounds of appeal as outlined in the Notice of Appeal are summarised as follows:

- a. The learned Regional Magistrate erred and/or misdirected himself by failing to explain the minimum sentences and competent verdicts both at the stage the appellant pleaded guilty and even after his plea was changed in terms of section 113 of the CPA.
- b. That during the pre-trial conference and at the commencement of the trial the provisions of section 93ter (1) of the Magistrate's Court Act 32 of 1944, were not explained to the appellant and he never made a request not to sit with assessors in his trial.

2.3. Alternatively, the appellant's legal representative, even though he was asked by the Magistrate if the appointment of assessors was necessary, and he said "not necessary"... the learned Regional Magistrate did not enquire from neither the accused nor his legal representatives as to whether the provisions of section 93 ter were explained and understood by the accused.

2.4. The respondent does not oppose this application.

3. The law

3.1. Section 93 ter Act 32 of 1944 provides that:

"(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 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 the trial be proceeded without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him".

3.2. The charge preferred against the appellant is murder. As such, it required that section 93ter of the Magistrates' Court Act 32 of 1944 (MCA) be applied.

3.3. The record does not reflect that the learned Regional Magistrate had promptly explained the provisions of section 93ter (1) of the Magistrates' Act to the appellant, nor does it reflect that he explained the requirement contained in this subsection, save to state that he asked the appellant's legal representative:

"Court:

Is the appointment of assessors in terms of section 93 (indistinct.) of the Magistrates Court Act necessary?"

Attorney:

No your worship, not necessary.

Court:

Right, thank you Mr Ngwenya

Thank you, your worship.

3.4. This forms the gist of this appeal. It is alleged that the aforementioned does not comply with the dictates of section 93ter of the MCA. The appellant therefore contends that section 93ter of MCA creates an obligation on the part of a Regional Magistrate, presiding over a trial involving a charge of murder, first to inform the accused person before the commencement of the proceedings what the peremptory provisions of the law requires to ensure the proper constitution of the court; and second, to inform the accused person that she or he may request that the trial proceed without assessors.

4. Appellants submissions:

4.1. The proper interpretation of section 93ter is that the Regional court in this case would be properly constituted only if it sits with two assessors. The exception would only be in case the accused made a request for his case to be heard without assessors, in which case, the Regional Magistrate would still have a prerogative of exercising his discretion to appoint one or two assessors to sit with him.

4.2. It is notable that the discussion about section 93ter took place at the pre-trial stage, but was not entertained at the commencement of the trial.

4.3. The appellant submits that this is crucial because at the commencement of the trial the accused pleaded guilty, and his plea was changed to not guilty in terms of section 113 of the CPA.

4.4. It is the view of the appellant that if this Court was to find that section 93ter was sufficiently complied with during the pre-trial conference, leading to the accused plea in terms of section 112(2) of the CPA, then the trial court had the duty after changing the plea to that of not guilty, to confirm if the accused position regarding assessors still remained the same, given the seriousness of the charge coupled with the fact that the charge was also amended to section 51(1) of Act 105 of 1997.

4.5. In the case of *Gaiya v S* (1018/15) (2016) ZASCA 65 (19 May 2016 at para 8 it was held that:

“The section (section 93ter (1) is peremptory. It ordains that the judicial officer presiding in a regional court before which an

accused is charged with murder shall be assisted by two assessors at the trial, unless the accused request that the trial proceed without assessors. It is only the accused make such a request that the judicial officer become clothed with the discretion either to summon one or two assessors to assist him or to sit without assessors. 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 (the accused) request that the trial proceed without assessors.”

4.6. The Supreme Court of Appeal held that the failure to comply with the proviso resulted in the court not properly constituted and it set aside the conviction and sentence.

4.7. The Supreme Court of Appeal reaffirmed the decisions of Gayiya in *S v Mntambo* (478/2020) 2021 ZASCA 17 (March 2012) as follows:

“In S v Gayiya 2016 (2) SACR 165 (SCA) this court, referring to Chala v DPP, KwaZulu-Natal 2015 (2) SA 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not set 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.”

4.8. In the case of *S v Langelitshoni* 2020 (2) SACR 65 (ECM), the Regional Magistrate in the court a quo enquired from the accused’s legal representative whether the accused are going to use the services of assessors.’ Brooks J opined that this amounted to no explanation at all and gave a useful step-by-step

guide with reference to the practical application of section 93ter.

5.

Conclusion

5.1 The effect of not complying with section 93ter (1) in line with *DPP KZN v Pillay* (706/2020) ZASCA 105; 2023

(2) SACR 254 SCA; 3 ALL SA 613 SCA (23 June 2023) is that the court was not properly constituted and the conviction and sentence as in *Giyani, Shange* 2016 ZASCA 65, 2016 (2) SACR 165 SCA and *Mntambo* to be set aside.

6. Order

Resultantly, the following order is made:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

N MOREI

ATING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

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