

SOUTH AFRICA / JUDGMENT

Nkute v S (A224/2020) [2021] ZAGPPHC 574; 2022 (1) SACR 436 (GP) (18 August 2021) [2021] ZAGPPHC 574

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, R Matthys

CASE / FILE NUMBER

A224/2020

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IN

THE REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A224/2020

In

the matter between:

NKUTE,

TAEKE

Appellant

and

THE

STATE

Respondent

DATE

OF HEARING: This matter was enrolled

for hearing on 19 APRIL 2021,

but was dealt with or determined on the basis of the papers or record
and written argument filed on behalf of the parties, without
appearance and oral argument.

DATE

OF JUDGMENT: This judgment was

handed down electronically by circulation to the parties'
representatives by email. The date and time of
hand-down is deemed to

be 10h00 on 18 AUGUST 2021

JUDGMENT

KHUMALO J (MATTHYS, AJ concurring)

Introduction

- [1] Taeke Nkute, the Appellant, was on 31 January 2014 convicted by the Benoni Regional Court (“the Trial Court”) on two counts, namely Robbery with aggravating circumstances and murder. On 11 February 2014 he was sentenced to 15 years and life imprisonment on the respective counts. With leave granted by the court a quo on 29 May 2014 he is appealing against both convictions and sentences. He nevertheless in terms of Section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 had an automatic right to appeal against the conviction and the life imprisonment sentence that was imposed on the murder charge.
- [2] On 11 December 2020 the parties were informed of the 19 April 2021 being the set down date for the hearing of the appeal and a directive issued for the Heads of Argument to be filed on or before 19 February 2021. On 15 March 2021 the Respondent filed a notice for the striking off of the Appellant’s Appeal from the roll on the basis of Appellant’s failure to adhere to the directive and Rules of Court in that he had failed to file his Heads of Argument on the specified date. On 18 March 2021, the Appellant’s Heads of Argument were filed without an Application for condonation for non-compliance or a response to the Respondent’s Notice for the matter to be struck off the roll.
- [3] The Appellant is granted legal assistance by Legal Aid South Africa.
- [4] It is common cause that the record is incomplete. According to the Appellant the Plea proceedings and the entire evidence of the state witnesses are missing. This has resulted in the notes of the Magistrate from Page 1 to 10 and the Judgment been filed, to constitute the reconstruction of the record. Whilst according to the Respondent the record is incomplete in that the proceedings on 11 February 2014, which is the sentencing procedure and the Judgment on sentence are not part of the record.
- [5] The prosecution of the Appeal is taking place more than five (5) years after leave to appeal was granted, the Appellant has however not applied for condonation for the delayed prosecution.
- [6] The Appellant, without addressing the issues of the Respondent’s Notice of objection and Condonation, primarily argues that there has not been a proper reconstruction of the record and the notes of the Magistrate cannot be referred to as a reconstructed record. The Appellant and the other Accused have not been involved in the reconstruction of the record, even though it is required that all the parties must be present during the reconstruction process, be involved by having an input and all agree on the reconstructed record.

- [7] He further contends that although the duty lies with the Appellant to place an adequate record of the proceedings before the court of appeal, the state is the custodian of the trial records and has the duty to provide a record to the court of appeal. No fault can be attributed to the Appellant for not placing a proper record before the honourable court of appeal.
- [8] As a result Appellant argues with reference to *S v Sebothe and Others* 2006 (2) SACR that, where there is no record of the proceedings and it is impossible to reconstruct the record, as there would be no fair hearing of the Appeal in terms of s35 (3) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the conviction and sentence should be set aside.
- [9] There are therefore two objections before the court that are to be dealt with in limine. The first one is that of the Respondent that the matter should not proceed before the court but be struck off the roll due to Appellant's failure to file Heads of argument timeously as per directive. Appellant has also not applied for condonation of the late filing of his heads of argument.
- [10] Furthermore, even though the Appellant failed to prosecute his appeal timeously, delaying for a period of more than five (5) years, he has not applied for Condonation. The failure to apply for condonation can be raised mero motu by the court. The two condonation issues have therefore to be addressed prior to considering the Appellant's objection to dealing with the merits of the Appeal and his demand that the convictions and sentences be set aside on the basis of the incomplete record.

On delay and Condonation.

- [11] The Appellant has not addressed the issue of the delay and or condonation for the late prosecution of the Appeal that is (5) five years late, as is evident from the record. The Appellant mainly just objects to the Appeal proceeding on the basis that for the reason that the record is incomplete he would not be afforded a fair trial in the context of the prosecution of his appeal and therefore the convictions and sentences should be set aside.
- [12] This Court takes a dim view of parties disregarding its rules, and generally requires that a reasonable explanation be given for a delay in an Application for it to determine if the delay can be condoned. On the face of such a long delay the Application for condonation is imperative and failure to apply for condonation fatal, as the Appellant cannot bring the Appeal without having applied and been granted Condonation. Consequently, the Appeal is not properly before the court until a decision has been made on condonation. In *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014
- (2) SA 68 (CC); 2014
- (1) BCLR 65 (CC) at para 23. this Court held that:

“It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation of the non- compliance

with the rules Of great significance, the explanation must be reasonable enough to excuse the default.”

[13] A full, detailed and accurate account of the causes of the delay and their effects must be furnished, so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice; see *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017

(6) SA 90 (SCA) at para [26]

[14] Condonation is therefore not a mere formality and is not to be had “merely for the asking”. What is required is an explanation not only of the delay in the timeous prosecution of the appeal but also the delay in seeking condonation for non- compliance; see *Uitenhage Transitional Local Council v South African Revenue Service* 2004

(1) SA 292 (SCA) at para [6]. The Applicant must show that he did not wilfully disregard the timeframes provided for in the Rules of Court

and obliged to satisfy the court that there is sufficient or good cause to be excused from compliance.

[15] As a result where there has been a flagrant breach of the rules, especially where no explanation is proffered, Condonation may be refused; see *Erasmus v Absa Bank Ltd and Others*, unreported, case no: A/982/13, Gauteng Provincial Division, Pretoria, Full bench per Potteril J, at para [11]. The Applicant should convince the court to exercise its discretion in his or her favour.

[16] In this matter as indicated we are dealing with a recalcitrant Appellant, who not only failed to apply for condonation for failure to timeously prosecute his appeal but also failed to file his heads of argument timeously and to apply for condonation offering an explanation for his non-compliance, notwithstanding being aware of the Respondent’s application for the striking off of his Appeal for that reason.

[17] Moreover, it is significant that a Notice of set down and a directive on the filing of heads of argument and record was issued and served on the parties as far back as on 12 December 2020, clearly setting out what the parties, specifically the Appellant, is required to do in order for the matter to proceed on the date of set down, failing compliance Appeal would be struck off. The Appellant, acting with total indifference and flagrant disregard of the process,

provides no reasonable explanation for his non-compliance with the directive and Rules of this Court. In *Tshivhase & another v Tshivhase & another* [1992] ZASCA 185; 1992

(4) SA 852 (A) at 859E-F, Nestadt JA said that:

“this court ‘has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are’ and that this applies ‘even where the blame lies solely with the attorney’.

[18] As the matter is not properly before court there is no justification for the matter to remain on the roll or for this court to proceed to hear the Appeal. A case has been made for the striking off of the Appeal from the roll.

[19] This court consequently cannot deal with the merits of the Appellant’s contention which he raises on the ground that the record is incomplete. The objection is essentially to the similar sentiments that the appeal ought not to continue but for the reason of an incomplete or inadequate record of trial proceedings or record, however that this Court should, instead, set aside the trial

proceedings which led to his conviction and sentence on the basis that the right in terms of section 35 (3)[1] of the Constitution will be violated.

[20] Notably even on the question of the incomplete record, the Appellant also does not deal fully with the question of how he (being aware as he argues that the right to a fair trial is at stake), had made sure that due process for the reconstruction of the record is followed. He failed to indicate mainly his role in the construction of the record or endeavours to comply or adhere to the Court Rules that puts on him and his legal representative, the ultimate responsibility for ensuring that a copy of the record is before the Appeal Court; see s Rule 51 (3). The right to a fair trial not being absolute, the right of the victims of crimes to get justice is also at stake which should be evenly balanced in the context of a fair trial.

[21] The Appellant has conceded that he has neither participated in the procurement or reconstruction of the record nor was he involved in any such endeavours. He has also neither alleged to have raised any objections to the manner in which the record has been reconstructed prior the hearing, besides tardily raising such objections in his heads of argument. Furthermore, his argument that all the blame should be set at the door of the state as the custodian of the trial record and no fault can be attributed to him, is not supported by any authority.

[22] In *Schoombee & Another v S* 2017

(2) SACR 1 (CC) it was held that where a trial record has gone missing, the trial court ought to seek reconstruction of the trial record, as the

reconstruction of the trial record is “part and parcel of the fair trial process”.[2] The Appellant as the party required in terms of the Rules of Court to place the record of appeal before the Appeal court to play an active role by monitoring and overseeing the process.

[23] As held in the relevant authorities all parties are to participate in the reconstruction process. It is therefore a collaborative effort. In *S v Zondi*[3] it was held that:

“in the event of an inadequate trial record both the State and the appellant have a duty to try and reconstruct the record from secondary sources”.[4]

[24] The same position is maintained in *S v Gora* wherein it was held that protection or realisation of the right to fair trial would have been achieved when the parties have successfully

collaborated towards a proper reconstruction of a sufficiently accurate trial record for a proper adjudication of the issues in the appeal.[5]

[25] Therefore, there is no merit in the Appellant’s view that the State bears the exclusive responsibility towards reconstruction of the trial record. The location of the various duties towards ensuring that an adequate trial record is available for a proper adjudication of an appeal is also clearly outlined by the following dicta in *Schoombie*:

“[20] If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is 'part and parcel of the fair trial process'.{12} Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the state in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. [13] Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required. [14]

[21] In that regard the obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, 'both the State and the appellant have a duty to try and reconstruct the record'.[15] While the trial court is required to furnish a copy of the record, [16] the appellant or his/her legal representative 'carries the final responsibility to ensure that the appeal record is in order'.[17] At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent. [18]

[26] Accordingly, when reconstruction is necessary, the obligation lies not only on the appellant, but indeed primarily on the court to ensure that this process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interests of Accused as well as their victims.”[6]

[27] The above quotation from the decision of Schoombee clearly suggests involvement of all the primarily role-players in ensuring that an adequately reconstructed trial record reaches the appellate court; the convicted accused or appellant and or his/her legal representative and the State.[7] In *S v Gora* the reconstruction is considered a collaborative effort.[8] Overall the court bears the primary responsibility to ensure that the reconstruction process is undertaken in a scrupulous and meticulous manner to ensure that the process complies with the right to a fair trial, not only for the interests of the Accused or Appellant, but also of the victims of the crime(s).[9] For, in as much as the interest of society is not served by subjecting an appellant or accused to an unfair trial or an unfair

appeal process, they are also not served by an appellant or accused wrongly discharged on the basis of the record of proceedings being unavailable due to the failure on the part of some of the role-players to take reasonable steps towards reconstruction of the record.

[28] It should be noted that the required standard of reconstruction is not that a perfect record be produced by the reconstruction process, but a record on whose basis the appeal could be properly adjudicated or a record adequate to ensure the exercise of the appellant's

constitutional right of appeal. Essentially, what is material is not the absence of defects in the record but the presence of defects

serious enough to render impossible a proper consideration of the appeal, which depends, among others, on the nature of the issues to be determined in the appeal and the nature of the defects in the record.[10]

[29] The record may have been "improperly and imperfectly reconstructed"; incomplete or defective,[11] but as long as it is adequate in ensuring that the appellant exercised his constitutional right of appeal.[12] In *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) at 5.the SCA, the court, dealing with an incomplete record, and in support of the view that a defective record need not be perfect but only be adequate explained as follows:

"[T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal

of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see eg *S v Collier* 1976

(2) SA 378 (C) 379A-D and *S v S* 1995

(2) SACR 420 (T) 423b-f)."

"The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

[30]

In addition, s 235 (1) of the CPA reads: “It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded”. [underlined for emphasis]

- [31] Therefore, the appellant’s criticism of the notes kept by the trial magistrate being made available in some respects as also part of the proceedings where there does not appear to be a clear provision in the CPA as to solutions, is misplaced. The prevailing authorities are to the effect that efforts ought to be made to obtain the best possible evidence of the missing record or the missing part of the record, from every source capable of making a contribution.[13]
- [32] In *S v Gora* notes by the trial magistrate were utilised in the reconstruction process.[14] In *S v Leslie*[15] 2000
- (1) SACR 347 (W) there is a useful list of sources from which information may be obtained for purposes of reconstruction of the record.
- [33] Now, considering the effect the striking off of the matter would have on the administration of justice and for the matter to reach finality, it is necessary that a directive be issued in terms of which the matter is to be dealt with. The importance of the rights that are affected weighs heavily in favour of such directive. In order to ensure that the reconstruction process is not flawed and there is maximum chance that the matter is fairly adjudicated upon as and when it is properly brought before the court, we took guidance from the approach taken in *Mohapi v Minister of Justice and Correctional Services & others*[16] of accompanying the order for reconstruction of the record, with a schedule to be followed by the role-players in order to ensure a speedy finalisation of the matter.[17]

It is therefore ordered, that:

1. The Appeal is struck off the roll.
2. Provided that the appeal be pursued by the Appellant, within 20 days from the date of this order a date be arranged by the parties through the office of the Clerk of the Trial Court to meet in an open court for purposes of jointly undertaking the reconstruction process; to be attended by the presiding officer of the impugned proceedings at the Benoni Regional Court, the Appellant, assisted by his legal representative, and the State, represented by the Prosecutor;

3. At the meeting the presiding officer to place on record the fact that the meeting is for the purpose of reconstruction of the record prior to the commencement of the reconstruction process;
4. All parties are to express their views (and the views are to be recorded) regarding whether in their recollection each aspect of reconstruction accords with the evidence tendered during the trial; and
5. All the parties state their views including the Appellant and his legal representative on the reconstructed record as per documents filed by the magistrate and if not accepted indicate in detail what has been erroneously omitted or added and if agreed such to be added or omitted as per the outcome of the discussion, inputs and or interpretation.
6. The record is also to be reconstructed to the extent necessary and capable of reconstruction;
7. The State, that is the Respondent herein, shall bring this order to the attention of the Clerk of the Trial Court within 10 ordinary days from the date of this order;
8. The Clerk of the Trial Court is to bring the contents of this order to the attention of the presiding officer who presided over the trial proceedings in the Trial Court at the Benoni Regional Court and to the President of the Court within 10 ordinary days from the date of receipt of this order;
9. The presiding officer who presided over the trial proceedings of the Trial Court, shall fix a date or dates for the reconstruction proceedings not later than 15 ordinary days from the date of receipt of this order as envisaged by 1) of this order, including inviting the appellant and his previous and current legal representatives, the prosecutor, and applicable interpreter to attend court in order to jointly undertake a reconstruction of the record.
10. The reconstruction proceedings envisaged in terms of this order shall be recorded;
11. Alternatively, where meeting of all the parties is not feasible the
12. Appellant and the other parties can submit their input on the reconstructed record by way of an Affidavit, which is to be within 10 days of receipt of the notice informing them of the missing part of the proceedings in the reconstructed record
13. The clerk of the Trial Court shall ensure that the reconstructed record is transcribed within 30 ordinary days of the date of the completion of the reconstruction proceedings;
14. Upon receipt of the transcribed record, the clerk of the Trial Court shall provide a copy of the record to the appellant's legal representative currently on record within 15 ordinary days from date of receipt thereof, for purposes of enrolment of the appeal,

N V KHUMALO

Judge of the High Court

I agree

R MATTHYS

Acting Judge of the High Court

Appearances:

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- [1] Section 35(3) of the Constitution reads in the material part: “Every accused person has a right to a fair trial, which includes the right ...of appeal to, or review by, a higher court”.
- [2] Schoombee & another v S at [20], citing with approval from S v Gora at par 16.
- [3] S v Zondi 2003
- (2) SACR 227 (W) (a full bench decision of the Witwatersrand Local Division (as Gauteng Local Division, Johannesburg was known then) coram Hussain J and E M Du Toit AJ).
- [4] S v Zondi at par 15 (or p 245c-d), cited with approval in S v Gora at par [13].
- [5] S v Gora at pars [14] and 50, cited with approval in S v Schoombee at par 15.
- [6] Schoombee at pars [20], [21] and [38]. Also at par [38].
- [7] Schoombee at par 21 and at par [38].
- [8] S v Gora at pars [14] and 50, cited with approval in Schoombee at par [15].
- [9] Schoombee at par [38].
- [10] Schoombee at par [28] and footnote 35 above.

- [11] Schoombee at pars [27]- [28], partly relying on the finding in S v Chabedi at pars [5]-[6], which finding in S v Chabedi was further affirmed by the SCA decision of S v Machaba and Another 2016
- (1) SACR 1 (SCA); ([2015] ZASCA 60) at pars 4-5 and the Constitutional Court decision in S v Phakane at par [39].
- [12] Schoombee at pars [27]- [28].
- [13] See Du Toit's Commentary on the Criminal Procedure Act at chapter 30, p 36 and the authorities cited therein.
- [14] S v Gora at pars [19]- [23].
- [15] S v Leslie 2000
- (1) SACR 347 (W) (a full bench decision of the Witwatersrand Local Division (as Gauteng Local Division, Johannesburg was known then) coram Flemming DJP, Goldstein J).
- [16] Mohapi v Minister of Justice and Correctional Services and Others (M249/15)
- [2016] ZANWHC 5 (5 February 2016).
- [17] Ibid at pars [7]- [8].

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