

SOUTH AFRICA / JUDGMENT

Pitje v S (A519/2014) [2018] ZAGPPHC 552 (1 August 2018) [2018] ZAGPPHC 552

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi, S.N.I. Mokose

CASE / FILE NUMBER

A519/2014

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
(1)
NOT REPORTABLE
(2)
NOT OF INTEREST TO
OTHER JUDGES
Case
number: A519/2014
1/8/2018
In

the matter between:

SIMON
MOLEFE PITJE
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

KUBUSHI, J

- [1] This case involves a record of proceedings destroyed in a fire which required to be reconstructed for purposes of an appeal.
- [2] The appellant, Simon Molefe Pitje, was arraigned in the regional court, Pretoria, on three counts of fraud, forgery and uttering. He was on 28 February 2005 convicted on only one count of fraud. On 4 February 2013 he was granted leave by the trial court to appeal the conviction only.
- [3] We were informed that subsequent to the application for leave to appeal, there had been numerous attempts to reconstruct the record as the mechanical recordings and original charge sheet were destroyed in a fire at the magistrate's court, Pretoria in 2010. This eventually led to this court ordering on 14 August 2017 the respondent to reconstruct the record and make it available to the appellant within sixty {60} days from the date of that order. As such, the reconstructed record was to be made available to the appellant on 13 October 2017.
- [4] According to the respondent, in its heads of argument, all possible attempts were made to reconstruct the record. It appears that the whole of the trial including the judgment on the merits of the matter was transcribed. What, however, seemed to cause the appellant to allege that the record is incomplete and thus required reconstruction is the sentence proceedings' part of the record. The reconstruction of the sentence proceedings was finalised on 12 October 2017 by the chief magistrate, Pretoria in the presence of all the parties. The chief magistrate in a letter dated 12 October 2017 confirmed that all the parties were in agreement with the reconstruction .
- [5] The clerk of the court, Pretoria , subsequently bound the record and a copy was provided to the Director Public Prosecutions on 27 November 2017. According to the respondent, the record was at the latest available for collection by the appellant on 27 November 2017 from the clerk of the court. It appears that the appellant made no attempt to collect the copy the reconstructed record.
- [6] When arguing the appeal before us, the respondent's counsel informed us that on 25 April 2018 the parties appeared before the Deputy Judge President Ledwaba where the reconstruction of the record was discussed. The Deputy Judge President was provided with a letter from the chief magistrate as confirmation that the parties were in agreement that the record has been reconstructed. The appellant's legal representatives are said not to have contested the said letter .

- [7] The appeal was re-enrolled and heard before us on 18 June 2018. A notice of set- down requesting the heads of argument on 18 April 2018 was served on the appellant on 14 December 2017. The appellant, on receipt of this notice of set-down, did not file heads of argument but instead filed a practice note raising a point in limine claiming that the respondent failed to provide a complete record as per the court order of 14 August 2017. The heads of argument that were later filed by the appellant did not deal with the merits of the appeal and only addressed the reconstruction and/or incomplete record.
- [8] Therefore, before this court, the appellant is resisting the appeal on two grounds. The first ground is that the purported reconstructed record was filed out of time as ordered by the court on 14 August 2017 and no condonation for such late filing was applied for. The second ground is that the purported record provided to the appellant is incomplete. The submission by the appellant's counsel is that what is missing from the record, which makes it incomplete, are the written inputs availed by the appellant following the attendance of the meeting at the chief magistrate's office on 10 and 12 October 2017. The said written inputs are alleged not to have been included in the reconstructed sentencing record. On the basis of these two grounds the appellant's argument is that the

reconstructed record should be rejected by this court as inadequate because the appellant is prejudiced thereby and is a violation of his constitutional right to a fair trial.

- [9] The issue before us presently is whether the reconstructed record provided to the appellant is incomplete, and, if not, whether the record has been filed out of time and, as such, requires an application for condonation for such late filing.

Is the reconstructed record incomplete?

- [10] The Constitutional Court in *Schoombie and Another v S* at paras 19 and 20[1] had this to say about an inadequate trial record:

"[19] It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key competent of this right. When a record is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside.

- [20] If a trial record goes missing [or is destroyed], the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the trial process." . . ."

- [11] The requirement, on whether a court can rely on the reconstructed record for the consideration of an appeal before it, is that the record must be adequate for proper consideration of that appeal; not that it must be a perfect recordal of everything that was said at the trial. The defects in a record, which are so serious as to render a proper consideration of the appeal not possible, depend, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal. The fact that essential evidence is missing must appear from the record itself or can be placed before court by means of an affidavit of the legal representative of the accused.[2]

- [12] In this instance, it is not in dispute that the appellant is appealing the conviction only. It is also not in dispute that the merit proceedings part of the record has been properly transcribed and forms part of the reconstructed record. From the perusal of the record, it is clear that only the part of the record which dealt with sentencing required to be reconstructed and such reconstruction was done on 10 October 2017 and finalised on 12 October 2017. In limine, the appellant contends that the respondent failed to furnish the reconstructed record which is in itself, incomplete as it failed to incorporate his input which had been furnished to the chief magistrate.
- [13] I am satisfied that the available record including the reconstructed part thereof is adequate to address the issues raised by the appellant in his appeal because they relate to the conviction. The reconstruction of the record may not be perfect but the imperfections are, in my view, not relevant for purposes of this appeal as they are part of the sentence proceedings which the appeal does not refer to. The evidence relevant to the consideration of the appeal is on record which is accordingly adequate for purposes of this appeal.

Was the record furnished to the respondent out of the time in terms of the court order requiring application for condonation?

- [14] The issue of the respondent's failure to furnish the appellant with the reconstructed record within a period of sixty days as ordered by the court on 14 August 2017 was raised in argument but not canvassed in the appellant's heads of argument.
- [15] It is common cause that on 14 August 2017 the court ordered the respondent to provide the appellant with a complete record within sixty days of the order. It is also common cause that the sixty day period would have lapsed on 13 October 2017. It is also not in dispute that the reconstruction of the record was finalised on 12 October 2017 by the chief magistrate in the presence of both parties. The record was handed to the clerk of the court for binding and was only made available to the parties on 27 November 2017.
- [16] It is trite that the ultimate duty to prepare the record for the appeal rests upon the appellant, [3] but, there is an antecedent duty upon the clerk of the court in terms of rule 67 of the Magistrates ' Courts Rules .[4]
- [17] In this instance, the duty to provide the record was imposed on the respondent by the court order of 14 August 2017. The record had been reconstructed by the due date and the chief magistrate who presided over the reconstruction confirmed in a letter that the reconstruction had been finalised on that day. What remained was for the clerk of the court to bind it and furnish same to the parties.
- [18] It is my view that the delay occasioned by the clerk of the court in furnishing the parties with the reconstructed record cannot be attributed to the respondent. The respondent did all within its powers to see to it that the record was reconstructed within the period of sixty days as ordered by the court. I do not think that it was the respondent's duty to bind the record; this duty fell on the clerk of the court in terms of the Rules of court. The

respondent's duty ended once the record had been reconstructed. There was, thus, no need for the respondent to have applied for condonation under the circumstances.

[19] In the premises I make the following order:

1. The point in limine is dismissed.
2. The appeal is to proceed on the record as it stands.

E.M . KUBUSHI

JUDGE OF THE HIGH COURT

I concur

S.N.I MOKOSE

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant: Adv

B P Geach

Instructed by:

PRETORIA JUSTICE CENTER

2nd Floor FNB Building

206 Church Street

PRETORIA 0001

On behalf of the respondent: Adv M Van Vuuren

Instructed by:

DIRECTOR OF PUBLIC PROSECUTIONS

Presidential Building

28 Church Square

PRETORIA 0001

[1] Schoombie and Another v S 2017 (2) SACR 1 (CC).

[2] See S v Chabedi_2005 (1) SACR 415 (SCA) at para 5 to 6 - referred to with approval in Schoombie and Another v S 2017 (2) SACR 1 (CC) paras 19 and 20.

[3]See rule 51(3} of the Magistrates' Court s Rules .

[4] See also rule 66 {7} of the Magistrate's Court s Rules .

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