

SOUTH AFRICA / JUDGMENT

S v P.M (Review) (02/2023)

[2023] ZANWHC 184; 2024 (1)

SACR 1 (NWM) (5 October 2023)

[2023] ZANWHC 184

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen

CASE / FILE NUMBER

02/2023

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FLYNOTES: CRIMINAL – Child offender – Automatic review – Failure to transmit matter on automatic review in terms of section 84 of the Child Justice Act 75 of 2008 – Failure to deal with criminal trial in terms of the Child Justice Act – Misdirection on sentence – Imposition of an incompetent

sentence in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 – Misdirection on the applicability of section 51(2) and (3) of the Criminal Law Amendment Act 105 of 1997 – Proceedings reviewed – Conviction and sentence set aside.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

HIGH COURT REFERENCE NUMBER: 02/2023

MAGISTRATE'S SERIAL NUMBER: 01/2023

MAGISTRATE'S CASE NUMBER: RC 4/90/18

Reportable:

YES

Circulate to Judges: YES

Circulate to Magistrates: YES

Circulate to Regional Magistrates: YES

In the review matter between:

THE STATE

and

P[...] M[...]

Accused

CORAM: HENDRICKS JP; PETERSEN ADJP

DATE BROUGHT BEFORE PETERSEN ADJP: 12 AUGUST 2023

DATE OF JUDGMENT: 05 OCTOBER 2023

Summary: Criminal law and procedure – Review - failure to transmit matter on automatic review in terms of section 84 of the Child Justice Act 75 of 2008 – failure to deal with criminal trial in terms of the Child Justice Act - misdirection on sentence - imposition of an incompetent sentence in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 – misdirection on the applicability of section 51(2) and (3) of the Criminal Law Amendment Act 105 of 1997 – proceedings reviewed – conviction and sentence set aside.

ORDER

1. The proceedings in this matter are not in accordance with justice.
2. The conviction and sentence are set aside.
3. A copy of this judgment must be brought to the attention of the Magistrates' Commission and the Acting Regional Court President,

North-West Division.

4. A copy of the judgment is to be brought to the attention of the Director of Public Prosecutions, North-West Province for her consideration.
5. A copy of this

judgment

is to be brought to the attention of the Director: Legal Aid South Africa, North-West Province.

6. A copy of this judgment is to be brought to the attention of the Court Manager: Klerksdorp.

REVIEW JUDGMENT

PETERSEN ADJP

Introduction

[1] This matter initially came before Reddy AJ as a special review on 02 March

2023. The matter was transmitted by Regional Magistrate, Mr Foso, sitting at Klerksdorp Regional Court.

[2] The accused (child offender), born on 03 May 2000, was sixteen (16) years old when he was arrested on 15 October 2016 on charges of murder (count 1) and assault with intent to do grievous bodily harm (count 2). The date of his first appearance in the District Court, Klerksdorp is unknown. The record of proceedings of the District Court where the child offender would have appeared for a Preliminary Enquiry in terms of the Child Justice Act 75 of 2008 ("the CJA"), does not form part of the record. According to the charge sheet in the Regional Court, the child offender for the first time appeared in the Regional Court on 23 August 2018 (one year and ten months), following his arrest). The record indicates that the guardian of the child offender was present at court at all the appearances of the child offender in the Regional Court, save for the date on which he was convicted and all subsequent

dates thereafter, until he was sentenced.

[3] The charges in the Regional Court were drafted by a prosecutor Mr Motheogane, with the murder charge drafted to be read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"). On 11 October 2018, two years after his arrest and duly represented by a legal practitioner (attorney), Ms Mahomed from Legal Aid South Africa ("LASA"), the child offender tendered a plea of guilty to the charges before Mr Foso. The child offender was duly convicted as charged and the matter was postponed for a psycho-social (probation officer's) report, given that he was sixteen (16) years old at the time of the commission of the offences and had to be dealt with in terms of the CJA.

[4] On 27 February 2019, a sentence of eight years imprisonment was imposed in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 ("the CPA") on the murder charge and three years' imprisonment on the charge of assault with intent to do grievous bodily harm. The sentence on count 2 was ordered to run concurrently with the sentence on count 1 in terms of section 280(2) of the Criminal

Procedure Act 51 of 1977 (CPA).

Background

[5] As indicated above, the matter initially came before Reddy AJ on 02 March 2023 under cover of a letter dated 14 February 2023 drafted by Mr Foso. The customary Cover Sheet for Review Cases (J4) was duly signed by Mr Foso and dated 21 February 2023. The request by Mr Foso to review the proceedings, is quoted verbatim:

"INTRODUCTION

- [1] The accused was charged in the Regional Court before myself, in KLERKSDORP, with two counts. Count 1 being murder and Count 2 being assault with the intent to do grievous bodily harm. The accused pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 to both counts and he was subsequently convicted.
- [2] The probation officers report was obtained because of the age of the accused. On 27/02/2019 the accused was sentenced to as follows: Count 1: In terms of section 276(1)(i) of Act 51 of 1977, 8 years imprisonment. Count2: 3 years imprisonment. In terms of section 280 of the Act, Court ordered that the sentence in Count 2 to run concurrently with the sentence in Count 1. The automatic order of unfitness to possess a firearm followed.
- [3] The accused was sentenced on 27/02/2019 and at that time he was 19 years old. The Court found that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence in terms of section 51(3) of Act 105 of 1997.
- [4] The matter is sent on special review as it was brought to my attention during a discussion with a colleague/co-ordinator this morning, Mr Melodi. According to him was as well alerted by the correctional officer. I have enquired from Rustenburg Correctional

Service if the accused has been released or not. He is still there and he is being considered for parole. Information supplied by Mr Mokopi. I have requested that the record be transcribed as a matter of urgency to avoid any prejudice.

- [5] The accused was sentenced in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 to eight years' imprisonment, instead of section 276(1)(b) of the Act. Though I do not have an independent recollection of this matter/case apart from my own handwriting on the charge sheet, I suspect there could have been a writing error on my part.
- [6] I have exceeded my sentencing jurisdiction in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977, by imposing eight years' imprisonment.

Section 276(1)(i) of the Criminal Procedure Act 51 of 1977 provides:

- (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
- (i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

Section 276A(2) of the Criminal Procedure Act 51 of 1977 provides:

- (2) Punishment shall, subject to the provisions of section 75 of the Child Justice Act, 2008, only be imposed under section 276(1)(i)—
- (a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not

exceeding

five years; and

(b) for a fixed period not exceeding five years.”

[7] It is thus clear that the maximum sentence that I may impose subject to the provisions of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 is 5 years. The sentence of 8 years is thus not a competent sentence and should be set aside, as it is not in accordance with justice.

[8] Based on the aggravating and mitigating circumstances at the time, I was of the opinion that sentence of 8 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 respect of the charge of murder was an appropriate sentence.

[9] In the premise, I will request that the High Court set the initial sentence aside and alter it to read as such backdated to the date of sentence or impose a sentence that the High Court deems appropriate.

[10] An unreported matter of the North Gauteng High Court, Pretoria, of Uchechuku Oha and 1 other, dated 08 May 2015 under case A170/14 has been brought to my attention, wherein accused 2 was sentenced to 10 years imprisonment in terms of section 276(1)(i) of the Act.

[11] ...omitted.

Despite this, I believe I am out of my jurisdiction.

[12] I concede and apologize unconditionally for the oversight/mistake and request the Reviewing Justice to consider the matter for an appropriate order.”

[6] The record of proceedings placed before Reddy AJ was incomplete as there was no transcribed record. On 22 March 2023, Reddy AJ caused a query to be directed to Mr Foso, in the following terms:

“[1] In paragraph 4 the following is encapsulated in your request for the proceedings in Case RC4/90/2018 to be reviewed:

“[4] The matter is sent on special review as it was brought to my attention during a discussion with a colleague/co-ordinator this morning, Mr Melodi. According to him was as well alerted by the correctional officer. I have enquired from Rustenburg Correctional Service if the accused has been released or not. He is still there and he is being considered for parole. Information supplied by Mr Mokopi. I have requested that the record be transcribed as a matter of urgency to avoid any prejudice.”

- [2] The accused as per the original case record was sentenced on 27 February 2019. There appears to be no explanation of how this specific criminal matter came up for discussion on 14 February 2023 (the date of the drafting of your review request). Paragraph 4 of your minute lacks essential averments, please attach inter alia all relevant correspondence from the Rustenburg Correctional Facility clearly indicating the current position of the accused's parole. (inclusive of the detention warrant, SAP 69 or J3).
- [3] Your minute does not address the core issues of the absence of the transcribed court proceedings for 9 October 2018, 11 October 2018, 22 November 2018, 22 January 2019 and 27 February 2019. Notably, on the latter dates your court record is incomplete. There is no manuscript endorsement confirming whether the proceedings were digitally recorded or not.
- [4] The attached correspondence of the Officer seized with the Transcriptions and Appeals is wholly inadequate. Firstly, it is not in the affidavit form, secondly it lacks specificity in that the individual court dates alluded to are not addressed, thirdly it speaks to an annexure which is not attached.
- [5] You are referred to a decision in the apex court. Whilst it deals with appeals, there is no rationality in finding that it does not find equal application regarding review records. In *Schoombee and Another v S* (CCT 154/16)
- [2016] ZACC 50; 2017 (5) BCLR 572 (CC); 2017 (2) SACR 1 (CC) (15 December 2016) the following direction was postulated:

"[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 component 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, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial process". 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. 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.

[21] 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”. While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative “carries the final

responsibility to ensure that the appeal record is in order”. 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.”

You are kindly requested to address the contents of this query as a matter of urgency.”

[7] The query of Reddy AJ elicited no response until 01 August 2023, and was only received by the Registrar of this Honourable Court on 11 August 2023. The content of the response to the query by Mr Foso is quoted verbatim:

“[1] The review query was only brought to my attention by the Clerk of the Court on 28 June 2023. I have requested her to depose to an affidavit explaining what transpired that led to this review query being brought to my attention only then. Attached find her affidavit marked Annexure 1.

[2] Following the decision of the High Court in the APPEAL MATTER CASE CA 14/22: HIGH COURT NORTH WEST DIVISION, I was removed from KLERKSDORP Court and placed at STILFONTEIN Court only to return on 29 May 2023. I was under a lot of stress and that is the reason I lost track of this review matter and for that, I apologize. When I remembered the review, I immediately made enquiries and the Clerk found it and gave it to me.

[3] At paragraph 2 of the query.

1. I have requested Mr Melodi to dispose of an affidavit explaining how the matter came up for discussion. Attached find his affidavit marked Annexure 2.
2. Pertaining to the correspondence from Rustenburg Correctional Facility, it was a telephonic conversation. Mr Makopi’s contact number was written on the detention warrant or SAP 69. I immediately wrote down my review letter on the same day and handed the documents including the SAP 69 to the Clerk of Court with the view that all will then accompany the record.
3. The Clerk informed me that he contacted Rustenburg Correctional Facility and that the accused has since been released on parole supervision. Attached find the correspondence from Rustenburg Correctional Facility marked Annexure 3.

[4] At paragraph 3 of the query.

I only became aware of that there was no endorsement of the proceedings of 27 February 2019 when the matter was brought to my attention. I cannot write or change anything as I am of the opinion that the matter as it has go on review and the reviewing Judge will give a directive. This matter was indeed mechanically recorded.

[5] At paragraph 4 of the query.

I have brought the contents of this paragraph to the officer in question. I requested him to depose of an affidavit

regarding the transcripts. Attached find his affidavit marked Annexure 4.

[6] At paragraphs 5,19, 20 and 21 of the query.

Immediately upon receiving the query, I engaged Mrs Mahomed, the accused attorney and was on religious leave. On her return to work, she came to see me and I brought the review query to her attention. She went to look for her Legal Aid File and later informed me that I wrote the wrong subsection and depose an affidavit. Attached find her affidavit marked Annexure 5.

[7] I will await directives from the Honourable Reviewing Justice on how to further deal with the matter moreover the accused has been released on parole and any order the Justice deems appropriate.”

[8] The affidavit of the Clerk of Court, Susanna Adriana Cornelia van der Westhuizen (“Ms van der Westhuizen”), purports to mitigate the fact that the review query was not brought to the attention of Mr Foso. According to Ms van der Westhuizen the review query was received back from the High Court on 25 March 2023 by certain “people” whom she fails to identify, and who failed to return the file to her. Ms van der Westhuizen states that she was on sick leave from 25 April 2023 to 7 June

2023. On returning to work, Mr Foso enquired about the review. Ms van der Westhuizen alleges that she had to search for the file and once traced, she handed it to Mr Foso. Ms van der Westhuizen lastly, alludes to the SAP 69 which accompanied the child offender to prison, which she did not attach to the record when it was initially forwarded to the High Court. She maintains that she was unaware that it should accompany the review record. Notably, the SAP 69 (which accompanied the child offender to prison) as with the charge sheet (J15) reflects that the child offender was sentenced to eight (8) years imprisonment in terms of section 276(1)(i) of the CPA, on the murder conviction.

[9] I am constrained to deal with the tenor of the affidavit of Ms van der Westhuizen. The response of Ms van der Westhuizen to her role in the review query not reaching Mr Foso is demonstrative of a very nonchalant attitude to her duties as a Clerk of Court. She attributes the delay in bringing the review query to the attention of Mr Foso, to unknown persons who did not return the file to her. The distinct impression created by passing the proverbial buck is that there appears to be no record keeping by way of Review Registers, and consequently no follow up process and overhead checking by relevant head of office at the Klerksdorp Magistrates Court.

[10] Ms van der Westhuizen would do well to either remind herself of her duties or re-acquaint herself with the Justice Codified Instructions Code: Clerks of the Criminal Court and Child Justice[1] (“Code: Clerk of Courts”), issued by the Branch: Court Services of the Department

of Justice and Constitutional Development. Chapter 12 of the Code: Clerk of Courts is instructive on the duties of the Clerk of Court in respect of Reviews. The Code: Clerk of Courts, requires of every Clerk of Court to be fully acquainted with various pieces of legislation, including the CJA.

- [11] The review query of Reddy AJ was clearly received back at the Klerksdorp Magistrates Court, within one day of being returned by the Registrar of this Court. For a period of one month and a further two months thereafter, when Ms van der Westhuizen was on sick leave, the review record with the query, received no attention from any Clerk of Court. It is most disconcerting that no other Clerk was assigned to attend to the duties of Ms van der Westhuizen in her absence. It is equally disconcerting that the review query was not brought to the attention of Ms van der Westhuizen upon receipt from the High Court. This unacceptable handling of review queries and reviews in general requires serious and urgent attention by the Court Manager, who needs to conscientize the Clerks about their specific duties set out in Item 217(b)(i) of the Code: Clerk of Courts, which emphasizes the urgency of review

queries as follows:

“(b)(i) When a review case is returned to the office with a query from the reviewing judge, the clerk of the court must without delay submit the review case to the judicial officer for his attention.”

- (ii) On receipt of the response on the query from the judicial officer the clerk of the court, shall immediately submit the review case and the response to the registrar of the High court.”

- [12] A further serious issue which evades all the dramatis personae involved in the matter and in particular Mr Foso and the Clerk of Court, Reviews merits scrutiny. I deal with this issue in greater detail later, but highlight at this stage, that both Mr Foso and the Clerk of Court, Reviews failed in their duties in 2019, by not appreciating that the matter was automatically reviewable based on the nature of the sentence imposed on a child offender. Whilst it was primarily the duty of Mr Foso to record that the matter was reviewable, on the J15, a diligent Clerk of Court, fully acquainted with his/her duties would have identified that the matter was reviewable and would have brought same to the attention of Mr Foso. Chapter 12(e) of the Code: Clerks of Court is instructive in that all matters where children are sentenced to any form of imprisonment in terms of the Child Justice Act 75 of 2008, whether in the District or Regional Court, regardless of whether legally represented or not, must be transmitted on review. Item 217(a)(i) and (ii) of the Code: Clerk of Courts is very clear regarding the duty of the Clerk of Court:

“Transmission of record of proceedings to registrar of the High Court

217. (a)(i) The clerk of the court shall transmit the prepared record of proceedings within one week (section 303 of the Act) after the sentence was imposed either by hand or by registered mail to the registrar of the High Court.

(ii) The record of proceedings must be sent in envelopes of suitable size so that the record of proceedings are not folded unnecessarily.”

- [13] In passing, it is not clear if any oversight was exercised to achieve Judicial Quality Assurance, by the erstwhile Regional Court President and/or present Acting Regional Court President or her delegate, the Regional Court Co-ordinator, in respect of the case records of Regional Magistrates in the North West Regional Division. Similarly, it is not clear if the Judicial Quality Assurance Component of the Magistrates Commission has attended to an inspection at the Klerksdorp Magistrates Court in the last four years.
- [14] According to Mr Melodi, a Regional Magistrate at Klerksdorp and Regional Court Co-ordinator for Klerksdorp Regional Court, all he can recall about the matter is being approached by officials from Rustenburg Correctional Centre where the child offender was serving his sentence. The said officials informed him that the child offender was due to be considered for release on parole, as he had already served the requisite period to be eligible for parole. The officials, however, informed him that they encountered a problem with the sentence as the child offender was sentenced to eight (8) years imprisonment in terms of section 276(1)(i) of the CPA, which period was three (3) years more than the prescribed maximum of five (5) years. He therefore brought same to the attention of Mr Foso and advised him to request a special review of the sentence.
- [15] According to correspondence received from Rustenburg Correctional Centre, the child offender was released on 13 April 2023, after serving half of his sentence. It is not clear if the child offender has since been placed under parole supervision. It remains unclear why the incompetent sentence was never queried by the Rustenburg Correctional Centre, upon admission of the child offender, and only queried four (4) years later.
- [16] According to Tebogo Lawrence Seokolo (“Mr Seokolo”), an administrative clerk at Klerksdorp Magistrates Court, the case at hand has no audio available for transcription. Mr Seokole states that a call was logged for retrieval of the transcription, but he was informed that the recording has been affected by ransomware. In a previous minute dated 21 February 2023, not deposed to under oath, Mr Seokolo indicated that when he searched the server, all he found was empty protocols and when he searched on the CRT machine itself, there was no audio as the recorder had previously been removed. A report relevant to the call which was logged indicates that the Department of Justice and Constitutional Development will be embarking on a project to recover the files, but that Mr Seokolo would still have to search the site server. No further information has been provided on the status of the project alluded to in the affidavit of Mr Seokolo, deposed to on 01 August 2023. The present status is that there is no recording available for transcription and secondary sources of such record are required for reconstruction of the record.
- [17] Lastly, Ms Mahomed who represented the child offender, states in her affidavit, that from her records and the cover of her case file, which she has annexed to her affidavit, the child offender was sentenced to eight

- (8) years direct imprisonment and not eight (8) years imprisonment in terms of section 276(1)(i) of the CPA, on the murder conviction. Ms Mahomed premised on the entries recorded in her file, rather presumptuously, concludes that in her opinion the record need not be reconstructed. Notably and inexplicably no affidavit has been obtained from the public prosecutor, Mr Motheogane to shed light on the sentence imposed.

The approach to lost and/or incomplete records

[18] In *S v Nkhahle* 2021

- (1) SACR 336 (FB), Daffue AJP (Loubser J concurring), succinctly dealt with the issue of incomplete records on appeal, which applies equally to the present matter, where similar explanations have been provided

for a lost/incomplete record.

- [19] By way of comparison, in *Nkhahle*, the DCRS Clerk placed the blame for the absence of the recordings on the Court Manager who informed him that no backup server was installed to back up all recordings and the CRT machines were in fact not to be used. In *Nkhahle*, the following remarks were made regarding the duties of the stenographer:

“[15] What is most disturbing is the fact that the stenographer — also known as the DCRS or CRT clerk — did not do his/her most basic duties: either to switch on the machine and to test the machine and all the microphones before the start of proceedings, or to listen back to the recordings from time to time, ie during tea time, lunch time or immediately after the day’s proceedings. If that was the case, he/she would have picked up early on the very first day of the proceedings — 1 September 2017 — that nothing was recorded. Then the matter would still be fresh in the minds of everybody and their notes intact. A reconstruction would have been easy to do. The same applies to the second trial date, to wit 8 September 2017. The excuse that no server was installed in Ventersburg where the trial was conducted is just too lame to accept. I would have thought that back-ups are made on a daily basis by making use of memory sticks or CD's.

- [20] The Regional Magistrate, prosecutor and legal aid attorney were requested

by the senior administration officer to assist with the incomplete record. The

Regional Magistrate blamed what he perceived to be poor security at the courthouse for his missing notes which he stores in a cupboard in his office and remarked that it happened whenever the reconstruction of a record is required. In *Nkhahle* it was stated that it is expected of all the relevant parties, and the regional magistrate in particular, to keep their notes and ensure that they are properly preserved and stored.

- [21] As stated above, no attempt has been made at reconstructing the record and it appears that any instruction to do so, will prove futile, if regard is had to the tenor of the letter transmitted by Mr Foso, in response to the query by Reddy AJ.

[22] In Nkhahle the following was stated regarding the duty of a presiding officer to keep a record of proceedings (footnotes included):

“[17] ...

[17.1] There is a duty on a presiding officer to keep a record of the proceedings. [2] I agree with Thulare AJ,[3] commenting as follows:

'The court clerk is the recorder of the court proceedings, the clerk of the court is the custodian of court records and the trial magistrate is the constructor of court records through presiding over court proceedings. On the general consideration of all the factors herein discussed, I find myself unable to find that the duty to reconstruct a record lies with the clerk of the court. In my view, the duty to reconstruct lies with the trial magistrate.'

[17.2] The Judge President of this division warned presiding officers in a PEEC meeting of 27 March 2019 as follows:[4]

'The Chairperson indicated that he has a list of Magistrates who allow incomplete and unchecked records to be submitted to the High Court. A Magistrate whose name appears on that list will not be allowed to act in the High Court as a Judge, and such information will be made use of when such a person applies to be appointed as a Judge. He urged Mr Mathews to inform the Regional Court Magistrates about this.'

[17.3] I was provided with an extract of the file in petition No 10/2018, RC 04/2016, where Judge President Musi requested a reconstruction of the court record. The same prosecutor was involved, and his written explanation read about word for word the same as in this case. The same regional magistrate as in casu had the following to say:

'The notes I have for cases that have been finalised in RCP Welkom are in a state of disarray; How that has happened is unbeknown to me.

I therefore will not be able to reconstruct any of those cases because of the possibility of relevant evidence missing or important parts of same being mixed up with other cases. I have tried to put them together but still believe that it is far too risky to reconstruct the entire proceedings as is required in this matter.

This may result in the [travesty] of justice.'

The only comment I allow myself to make in this regard is that it would be a travesty of justice if more and more convicted criminals are allowed to walk free because of incomplete or lost records. Regional magistrates deal with serious criminal cases and may even impose life imprisonment. Record-keeping should be prioritised.

[17.4] The Constitutional Court held as follows in *S v Schoombee and Another*[5] and I prefer to quote quite extensively:

'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 component 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".

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". 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. 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.

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. While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative carries the final responsibility to ensure that the appeal record is in order. 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. . . . The loss of trial court records is a widespread problem. It raises serious concerns about endemic violations of the right to appeal.

Reconstruction should not be the norm in providing appellants with their trial records. But 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 criminal accused as well as their victims.' [Emphasis added.]

This warning by the full Constitutional Court — a unanimous decision by 10 judges — cannot be overemphasised and my observations herein are in line therewith. In that case the trial judge kept detailed notes of the proceedings, but when the record had to be reconstructed, he did not ask any inputs from the legal representatives of the parties. This left the door open for the appellant's legal representative to change tack when the Constitutional Court was approached by relying on an insufficiently transparent record insofar as the parties did not jointly undertake the reconstruction. The criticism was considered as is clear from the quotation, but the court found against the appellant. Significantly, no directives were forthcoming from the Constitutional Court as to how the problem of improper record-keeping should be addressed.

[17.5] In *S v Phakane*[6] the Constitutional Court stated the following:

'The failure of the state to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court, in circumstances in which the missing evidence cannot be reconstructed, has the effect of rendering the applicant's right to a fair appeal nugatory or illusory. Even before the advent of our constitutional democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceedings had to be set aside.'

Again, as in Schoombee, no directives were issued in an attempt to prevent

the numerous problems experienced with missing or incomplete records. Froneman J agreed with the majority that the appeal ought to succeed but suggested in his minority judgment 'that the matter be remitted to the High Court for an investigation into whether a retrial should proceed'.^[7] In my view a retrial in that case would probably be a waste of time insofar as the murder had been committed in 2006, 12 years earlier.

[17.6] In *S v Van Staden*^[8] the full court dealt with a similar situation as in *casu* and held that it is 'a matter of simple logic that, had the accused taken timeous steps to appeal, a reconstruction of the record would in all I likelihood have been possible'. The court also dealt with s 7 of the Magistrate's Court Act^[9] pertaining to the preservation and custody of records and when they may be destroyed. I respectfully agree with the court that abuse of the process by accused persons may cause a travesty of justice and that it is in the public interest to ensure that litigation is brought to finality as soon as possible. It is perhaps time for courts to approach applications for condonation more strictly instead of granting such applications as a matter of course."

[23] In *Nkhahle* it was observed that the position in most, if not all the Divisions of the High Court, regarding missing and/or incomplete records, was the same:

"[16] It becomes more and more prevalent, from my own experience dealing with reviews and appeals in this division, but also reading judgments from other divisions, that courts of appeal are confronted with missing and/or incomplete records. Something needs to be done urgently. We are living in the digital era, the so-called fourth industrial revolution, but it is often forgotten that the human element can never be ignored. Machines and sophisticated equipment must be operated by people and if the operators do not possess the necessary skills, the best equipment in the world becomes useless. I shall make some suggestions infra."

[24] In *Nkhahle*, the Court made certain suggestions pertaining to record-keeping and custody of records, where it said at paragraphs [24] to [26]:

"[24] In years gone by magistrates did the recordings themselves by having tape recorders on their benches and inserting tapes to record the trial proceedings, properly identifying the various tapes and making sure that the tapes were safeguarded for future reference. I recall from experience that magistrates also kept their handwritten notes for some time in order to ensure that transcribed records could be amended or supplemented when the need arose and have reason to believe that it is still the case in respect of most of them. It appears as if the regional magistrate wants to convey that somebody has stolen the particular notes of the case kept in her custody in her office. If this is accepted, it is a

serious reflection on security and the matter should be investigated.

[25] Advocate Botha of the DPP's office in Bloemfontein informed the court from the bar that his office has a system in place in terms whereof the records and notes of all criminal cases dealt with by that office are systematically stored and preserved. Fact of the matter is that prosecutors are supposed to keep notes primarily in order to assist when the need arises as mentioned supra, but also to assist the presiding officer to reconstruct a record if so required. I am glad to hear from Mr Reyneke that the office of Legal Aid South Africa in Bloemfontein keeps records for five years and that their notes can be retrieved at any given time. This is obviously also the case at the Kroonstad office, although the initial search for the relevant file was unsuccessful.

[26] The missing record in casu is not an isolated incident. Similar failures should be prevented as far as possible and it is suggested that the following be adhered to by the relevant role players:

[26.1] All presiding officers, prosecutors and legal practitioners appearing for accused persons shall keep their own notes for at least a period of five years;

[26.2] magistrates, prosecutors and legal representatives must ensure that their notes are systematically kept, either according to date of finalisation of a case, case number, the accused's name or all of these;

[26.3] stenographers (DCRS – CRT clerks) that do not know how the system works should not be appointed and if there are system changes, should be properly trained before they are allowed to do important work such as the recording of proceedings;

[26.4] stenographers should be called upon to inform the presiding officer verbally and preferably in writing on a daily basis that they have done spot checks throughout the day and that the machines were operating properly;

[26.5] courts should be concerned in granting condonation for late applications for leave to appeal, years after the event, especially where the records are either missing or totally incomplete; and

[26.6] security should be beefed up at all courts to prevent tampering and/or theft of court records or notes.”

[25] Mindful of the sentiments expressed in Nkhahle regarding the stenographer, the Regional Magistrate and the public prosecutor; and the salutary and binding judgment of the Constitutional Court in Schoombee regarding reconstruction of records, I propose to highlight certain aspects which none of the judgments dealing with lost and/or

incomplete records have considered, which may inform or address the problems encountered with lost and/or incomplete records.

[26] In respect of the Magistrates' Courts in particular, Rule 66 of the Magistrates' Court Rules is very clear in respect of the duties of the person employed to record criminal proceedings by mechanical means or who may be required to note same in shorthand. The Rule provides as follows:

"66 Records of criminal cases

- (1) The plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of the proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand (also in this rule referred to as 'shorthand notes') either verbatim or in narrative form or recorded by mechanical means.
- (2) Every person employed for the taking of shorthand notes in terms of subrule
 - (1) or for the transcription of notes so taken by another person shall be deemed to be an officer of the court and shall before entering on his or her duties in writing take an oath or make an affirmation before a judicial officer as provided in rule 30(5).
- (3)(a) Shorthand notes taken in the course of criminal proceedings shall be certified as correct by the shorthand writer and filed with the record of the case by the registrar or clerk of the court.
 - (b) Subject to the provisions of subrule (4) and rule 67(3),
 - (8) and (10), no such shorthand notes shall be transcribed unless a judicial officer so directs.
 - (c) The transcript of any shorthand notes transcribed under paragraph (b) shall be certified as correct by the person making such transcript and shall be filed with the record.
- (4) (a) In any case in which no transcription was directed in terms of subrule (3), any person may, on notice to the registrar or clerk of the court, request a transcription of any shorthand note taken by virtue of a direction given under subrule
 - (1) and shall, in respect of proceedings made by mechanical means, save in the case of the State, pay the full cost thereof as predetermined by agreement between the contractor concerned and the State for such transcript.
 - (b) One copy of the transcript of such shorthand notes shall be supplied, free of charge, to the person at whose request the transcription was made.
 - (c) The original copy of the transcript of any shorthand notes referred to in paragraph (a), shall be certified as correct by the person making such copy and shall be filed with the record of the case.
 - (d) A sum sufficient to cover the approximate fee payable under paragraph (a) shall be deposited with the registrar or clerk of the court in advance.

- (5) Subject to the provisions of subrule (6), any shorthand notes and any transcript thereof, certified as correct, shall be deemed to be correct and shall form part of the record of the proceedings in question.
- (6) The prosecutor or the accused may, not later than 10 days after judgment or where the proceedings have been taken down in shorthand or by mechanical means, within 10 days after the transcription thereof has been completed, apply to the court to correct any error in the record or the certified transcript thereof and the court may correct any such error.
- (7) Subject to subrule (4)(b), a copy of any transcript made simultaneously with the transcription of proceedings made by mechanical means may, upon application to the registrar or clerk of the court be supplied to any person upon payment, save in the case of the State, of the full cost thereof as predetermined by agreement between the contractor concerned and the State, in the case of a copy of a transcript referred to in subrules
- (3) and (4) (a).
- (8) Any reference in this rule to shorthand notes or to a transcription or transcript of such notes or to a copy of such transcript, or to a person employed for the taking of such notes, or to a person transcribing such notes, shall be construed as a reference to a record of proceedings made by mechanical means, to a transcription or transcript of such record, or to a copy of such transcript, to a person employed for the making of such mechanical record, or to a person transcribing such record as the case may be.
- (9) Where a magistrate or the court is satisfied that an accused is unable to pay the costs of obtaining a copy of any record or of any transcript thereof or is able to pay only part of such costs, such magistrate or court may, at the request of the accused, direct the registrar or clerk of the court to deliver a copy of such record or transcript to the accused free of charge or at such reduced charge as the magistrate or court may determine.”
- [27] Section 4(1) of the Magistrates Court Act 32 of 1944, provides that a court is a court of record and therefore a presiding officer is required to keep notes of proceedings in his/her court. The primary responsibility of ensuring that there is a court record therefore rests on the magistrate. Rule 66 in turn places the responsibility for keeping of the official court record on the person employed for such purpose (the custodian of the record). Rule 66(1) makes it clear that criminal proceedings may be noted in shorthand either verbatim or in narrative form or recorded by mechanical means. Rule 66(2) refers to every person employed for the taking of shorthand notes in terms subrule (1) or for the transcription of notes so taken by another person. This implies that stenographers (the correct designation being Clerk of the Court) are employed not only for recording proceedings by mechanical (digital) means but also to keep shorthand notes. This is evident in the compulsory oath or affirmation that such person is required to take in terms of Rule 30(5), which is also

firmly entrenched in the Code: Clerks of Court. The oath is to be taken in the following form:

“30(5)

- (a) Every person employed for the taking of shorthand notes or for the transcription of notes so taken by another person shall be deemed to be an officer of the court and shall before entering on his or her duties in writing take an oath or make an affirmation before a judicial officer in the following form — “I,, swear/solemnly and sincerely affirm and declare that I will faithfully, accurately and to the best of my ability take down in shorthand or cause to be recorded by mechanical, electronic or digital means, as directed by the judicial officer, the proceedings in any case in which I may be employed thereto as an officer of the court and that I will similarly, when required to do so, transcribe the same or, as far as I am able to do so, any other notes taken by any officer of the court or recorded by mechanical, electronic or digital means.”
- (b) Such oath or affirmation shall be administered in the manner prescribed for the taking of an oath or affirmation.”

[28] The oath in terms of Rule 30(5) extends the duties of the said clerk of court when required to do so, to transcribing the notes taken by any officer of the court, whether in the form of mechanical, electronic, or digital means. This in my view accords with the decisions dealing with reconstruction of records and strengthens the indictment on the importance of presiding officers and practitioners (attorneys and prosecutors), keeping notes of proceedings. The problem with lost and/or incomplete records is not isolated to the administration of justice in South Africa. The Namibian High Courts have dealt with the issue on numerous occasions.

More importantly, the Namibian High Courts have specifically considered the import of Rule 66 in the context of lost and/or incomplete records. The role of Rule 66 and that of a presiding officer and Clerk of Court was very succinctly set out in the unreported Namibian decision of *S v Mbangu and Others* (CR 24/2022) [2022] NAHCMD 174 (05 April 2022), where Claasen J (Usiki J concurring), stated as follows:

“Reconstruction of missing portions of court records

- [10] Unfortunately, reconstruction of lost transcripts or incomplete court records is not something alien to our courts and judgments have been written to give guidance thereon. Thus, it is inexplicable that it did not cross the mind of a judicial officer, who according to the information on the charge sheet has been a magistrate for more than 30 years, once she realised the court records are not complete. It necessitated a return of the incomplete records from the reviewing court to ask the magistrate about reconstruction, which lead to a delay and a waste of court resources, not forgetting the prejudice to the accused persons in the three matters. Eventually, by the time the magistrate replied last month the terms of imprisonment had been served in each of the criminal cases. That makes this an academic exercise, but because this is a repetitive problem with severe consequences the issue cannot be left unattended.

- [11] What happened in these matters is an illustration of why it remains critical for a judicial officer to keep proper notes of plea and trial proceedings by hand. In fact, there is a legal obligation on a magistrate to keep a record of court proceedings. That is evident in s 4(1) of the Magistrates Court Act, Act 32 of 1944 as amended (the MCA) which provides that every court is a court of record. The need to keep proper record is a recurrent theme in appeal and review judgments, yet it continues to fall on deaf ears. In all three of these cases, the machinery failed and the magistrate had no back-up notes of her own.

Administrative task of clerks of court and magistrates to reconstruct court record.

- [12] The matters also bears evidence that both the clerk of court and the magistrate were oblivious of their responsibility ‘..that it is the administrative task of the magistrate and/or clerk of court to compile afresh a record of the completed trial in any manner which is fair and as reliable as possible...’
- [13] Fairness entails that an accused be informed of the need for reconstruction and the right to participate in the reconstruction process. It appears to me that the minimum process to be followed will have to include that the judicial officer will direct the clerk of court to inform all parties, namely the accused or legal representative and the prosecutor about the lost record and arrange a suitable date for the court to reconvene and jointly participate in the reconstruction. Once the court is assembled the magistrate can place the purpose on record and afford each of the parties a chance to give their views to ensure that the record corresponds with their recollection of the evidence adduced at the original trial. Upon completion of the proceedings it will need to be certified as correct by the compiler of the proceedings, be it the magistrate or the transcriber, if it is again transcribed.
- [14] Hoff J (as he was then) in *S v Aribeb* outlined two different procedures depending on whether it is reconstruction where an accused person has been convicted or sentenced and the instance where the accused has not yet been convicted. In respect of the situations at hand, the *Aribeb* matter at para 10 gave guidance as follows: ‘...the clerk of the court would be directed to reconstruct the record with the assistance of state witnesses, the magistrate, the prosecutor, the interpreter or the stenographer. This reconstructed record is then submitted to the accused (or his or her legal representative) to obtain his or her agreement with it. The response of the accused is recorded under oath. (See *S v Gumbi* J 2014 (3) NR p712 A 1997 (1) SACR 273 (W); *R v Wolmarans* 1942 TPD 279; *S v Mankaji en Andere* 1974 SA 113 (T); *S v Whitney and Another* 1975 (3) SA 453 (N); *S v Stevens* 1981 (1) SA 864 (C); *S v Quali* 1989 (2) SA 581 (E); *S v Joubert* [1990] ZASCA 113; 1991 (1) SA 119 (A).) In such a case the clerk of the court endeavours to obtain the best secondary evidence regarding the content of the record and there is no room for a second ‘trial.’” See too: *Lizazi v State* (CA 23/2015)
- [2020] NAHCMD 91 (13 March 2020) and *Jeremia v S* (HC-NLD-CRI-APP-CAL-2020/00032) [2022] NAHCNLD 50 (6 May 2022).

[29] The Code: Clerk of Courts, which every Clerk of Court or Assistant Registrar should be fully acquainted with, sets out the duties and responsibilities of such officers of the Court with specificity. There should in my view be no excuses, as those evident in this matter and demonstrated in Nkhahle, which demonstrates a clear lack of knowledge of the full extent of their duties on the part of stenographers. This statement is not made lightly premised on the fact that none of the stenographers in their affidavits, reference any of the multiple duties they have in ensuring that there are no issues with recordings. Instead, the proverbial buck is passed to either Court Managers or the IT Department. Chapter 14 of the Code: Clerk of Courts dealing with MISCELLANEOUS MATTERS, specifically draws the attention of Clerks of Court to the case law relevant to replacement/reconstruction of lost records and to relevant Circulars 29 of 2009 and 32 of 2011. Item 300 of the Code: Clerk of Courts is instructive:

“Digital and mechanical recording of proceedings (DCRS)”

300.

(a) Appointment

(i) Any official performing duties as a DCRS clerk must have an appointment in writing as a clerk of the court in terms of section 13(1) of the Magistrates’ Court Act, 1944, See paragraph 1(a) supra and ANNEXURE A supra.

(ii) When performing duties in the regional court, it will be performed as an assistant registrar as is provided for in section 13A of the Magistrates’ Court Act, 1944. See paragraph 1(a) supra.

(iii) Any Assistant Registrar or Clerk of the Court performing duties as a DCRS clerk as provided for in Rule 66(2) of the Rules regulating the conduct of proceedings in the Magistrates Court of South Africa, must have taken the prescribed oath/affirmation as provided for in Rule 30(5)(a) of the Rules before commencement of such duties. See paragraph 1 supra and ANNEXURE B supra.

(b) Duties and Functions of Assistant Registrars/Clerks of Criminal Court working in court (DCRS) and CRT system.

(i) Handing over of DCRS and CRT equipment

(aa) Handing over of the court recording equipment must be done, on each and every occasion, whenever the DCRS/CRT operator changes or rotates to any other court room.

(bb) The “Handing Over and Control Sheet: Court Recording Equipment Register”, ANNEXURE LL must be fully completed and signed by both DCRS operators and checked weekly by the supervisor.

(cc) Every court room must have a ‘handing over and control sheet: court recording equipment register’ ANNEXURE LL.

(ii) Court room and court equipment security and readiness

- (aa) The assistant register/clerk of the criminal court must ensure at all times that all court room assets are properly secured, available and accessible.
- (bb) The assistant register/clerk of the criminal court shall ensure that the court room is ready for operation, i.e. switching on the air-conditioners, lights, etc. and report any deficiencies to the supervisor immediately for remedial action as well as inform the judicial officer and prosecutor sitting in that court room on that day.
- (cc) The assistant register/clerk of the criminal court must ensure every day before the commencement of court that the DCRS machine, microphones, cables and head set are all in good working condition and are ready for the court proceedings.
- (dd) The assistant register/clerk of the criminal court shall ensure every day before the commencement of court that the CCTV and/or AVR systems, where applicable, functions properly and are ready for court proceedings.
- (ee) Any defaults must be reported immediately to the Court Manager for remedial action. The judicial officer and prosecutor must also immediately be informed of any defaults. A register of defects of the AVR system must be maintained.
- (iv) Case records and digital recordings/DCRS clerk
- (aa) The assistant registrar/clerk of the court shall ensure that all case records, including the envelopes (J406s) and compact disks are kept safe and secured at all times.
- (bb) All case records, including the criminal record book must be kept in a lockable cabinet at all times, when the court is not in session.
- (cc) The assistant registrar/clerk of the court must on a daily basis register all cases on the digital court recording machine.
- (dd) IT IS THE DUTY OF THE ASSISTANT REGISTRAR/CLERK OF THE COURT TO ENSURE THAT ALL PROCEEDINGS ARE FULLY AND ACCURATELY RECORDED ON THE COURT RECORDING SYSTEM. (See Rule 30 and Rule 66 of the Rules)
- (ee) The assistant registrar/clerk of court shall ensure that all proceedings which were recorded during the day are burned to compact disks and that the burned compact disks are filed in the correct envelope (J406) for each case.
- (ff) The assistant registrar/clerk of the court must ensure that all particulars are fully and accurately recorded on the envelope (J406).
- (gg) The assistant registrar/clerk of the court must ensure that all data back-ups are done on a daily basis and that all data back-ups are correctly marked and stored safely.
- (hh) The assistant registrar/clerk of the court must ensure that all criminal case records are properly and neatly bound and that the names of the parties who will appear on that court day (if these particulars are known) are accurately recorded.

(v) Case records and recording of court proceedings on the Court Recording Technology System (CRT)

(aa) The attention of the Clerk of Court/Assistant Registrar is drawn to Circular 15 of 2017 dated 08 March 2017 regarding the use of the Court Recording Technology System (CRT).

(bb) System is always on, (goes into sleep mode). Clerk to bring up operational screen by clicking any key on the keyboard, the desktop will display and the user must double click on Autolog icon and logon with own user details.

(cc) Responsibility for checking all microphones and fault diagnosing of the CRT machine.

(dd) Report faults experienced during fault diagnosis process.

(ee) Responsible to capture the court roll from the court roll / court books and pre schedule the cases prior to commencement of the court proceedings.

(ff) Record the court proceedings as per the level of court and case type in session.

(gg) Add parties details per the court appearance and

(hh) Add related annotations for the case type in session.

(ii) Responsible for the stopping, pausing and resuming the recorder during court session breaks.

(jj) Always search for a postponed case and add later recording sessions to such is located. Headphones are available to court clerks during recordings.

(kk) Court Recordings are transferred to the site server in 15 minutes intervals (No need to burn CD's daily as the audio recordings are transferred to Site Server – See Retrieve Audio Recording for details).

(ll) Monitor that all court scheduled to conduct court proceedings on the day are in process.

(mm) Access site server link from the monitoring console and Tick off in court books all recordings located on site monitoring console.

(nn) Monitor audio transfer from court recorders to the server.

(oo) Report faults where transfers are not successful.

(pp) Monitor transfer of audio to the Central server.

(qq) Report faults where transfers are not successful.

(rr) On request of audio records for transcription purposes, the Court Clerk must request the supervisor to burn the recordings of the sessions to a CD store within the J406 case jacket, with clear markings and send to transcriber with the J33 request.”

Reviews in cases of criminal proceedings in Lower Courts

[30] The relevant statutory prescript in terms of which the matter was transmitted more than four (4) years after the accused was sentenced, was not indicated by Mr Foso. The matter presently comes on review as a finalised matter where the accused has been sentenced. The matter can therefore be considered

in terms of section 304(4) of the CPA or section 22 of the Superior Courts Act 10 of

2013. I pause to re-iterate that the review of this matter, has in fact been delayed for four (4) years since 2019, as it had to be transmitted as an automatic review, immediately upon finalization. Section 304(4) of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") provides that:

"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

(emphasis added)

[31] Section 22 of the Superior Courts Act 10 of 2013 provides a further statutory mechanism to review the proceedings of the Magistrates' Court, by providing that:

"22 Grounds for review of proceedings of Magistrates' Court

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[32] The matter may therefore be reviewed in terms of the CPA and the Superior Courts Act, if the proceedings are not in accordance with justice and inherent therein, if there is a gross irregularity in the proceedings. In my view, section 22 of the Superior Courts Act prevails in this matter, premised on gross irregularities in the proceedings, as will now be demonstrated.

Reviews in terms of the Child Justice Act 75 of 2008

[33] The CJA heralded a decisive change to how child offenders in conflict with the law are to be dealt with. The approach to sentencing

introduced new sentencing principles and procedural aspects in the conduct of proceedings involving child offenders.[10] This review is in fact four (4) years late. Aside from the incompetent sentence relied on as a ground for review by Mr Foso, he is clearly oblivious to the fact that the matter, which was automatically reviewable, had to be transmitted on review, within seven (7) days of sentencing the child offender on 27 February 2019. Section 85 of the CJA specifically provides, in peremptory terms, for the automatic review of proceedings in the following circumstances:

“85 Automatic review in certain cases

- (1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children’s Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of—
 - (a) the duration of the sentence;
 - (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;
 - (c) whether the child in question was represented by a legal representative; or
 - (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.
- [34] Section 85 of the CJA was amended by section 39 of the Judicial Matters Amendment Act 42 of 2013 and has been operational since 22 January 2014, more than half a decade before the child offender in the present matter was sentenced on 27 February 2019. The amendment draws no distinction between children under the age of 16 and those aged 16 or 17 at the time of the commission of an offence. There can therefore be no excuse for Mr Foso not being aware of this provision. In fact, it is incomprehensible, that at the level of the Regional Court, Mr Foso is oblivious to the peremptory prescripts of the CJA. When dealing with child offenders in particular, a knowledge of the intricate provisions of the CJA is of paramount importance.
- [35] The failure by Mr Foso to transmit the matter on review, immediately upon finalization thereof on 27 February 2019 and the submission of the matter more than four (4) years later when it was fortuitously discovered that he imposed an incompetent sentence, is a travesty of justice and constitutes a gross irregularity in the proceedings. The right to a fair trial enunciated in section 35 of the Constitution of the Republic of South Africa, 1996, includes

the right to review provided for in section 85 of the CJA. The incompetent sentence imposed and the basis of the present review, without derogating from the seriousness thereof, pales in comparison to the dereliction of the duty to transmit the matter on review.

Lack of knowledge of the Criminal Law Amendment Act 105 of 1997

[36] A further aggravating feature of this matter is Mr Foso also being oblivious his sentencing jurisdiction in the CLAA. This is best demonstrated with reference to his letter of 14 February 2023. The focus of Mr Foso is on the incompetent sentence imposed through non-compliance with section 276A(2) of the CPA, when he exceeded the maximum term of five (5) years by three (3) years. The imposition of the incompetent sentence is, however, aggravated by the fact that reliance was placed on the CLAA in respect of the murder charge, which clearly escapes Mr Foso.

[37] At paragraph [3] of the letter of 14 February 2023, Mr Foso states that “[3] The accused was sentenced on 27/02/2019 and at that time he was 19 years old. The Court found that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence in terms of section 51(3) of Act 105 of 1997.” The CLAA was not applicable to the child offender. Section 51(2), 51(3) and 51(6) and 51(7) of the CLAA, specifically provides as follows:

“(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years;
and

(ii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

...

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon

impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(4)(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
 - (ii) an apparent lack of physical injury to the complainant;
 - (iii) an accused person's cultural or religious beliefs about rape; or
 - (iv) any relationship between the accused person and the complainant prior to the offence being committed.
- (6) This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).
- (7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of that person beyond reasonable doubt.” (emphasis added)

[38] Section 51(6) of the CLAA, makes it clear that the CLAA is not applicable to children under the age of 18 years at the time of the commission of the offence. The child offender was 16 years old at the time of the commission of the offence. This constitutes a material misdirection on the part of Mr Foso. Therefore, the reliance placed on section 51(2) and 51(3) of the CLAA by Mr Foso, as also wrongly referenced by the prosecutor, was misplaced, and constitutes a further material misdirection. These misdirections on the part of Mr Foso in fact constitute gross irregularities in the proceedings. The sentence on this basis alone is vitiated by these misdirections.

[39] The aforesaid demonstrates a lack of knowledge by Mr Foso of the CLAA and by implication his sentencing jurisdiction as provided for in the CLAA in respect of children under the age of 18 years. This is very disconcerting as section 51(6) of the CLAA has been in operation since 22 January 2014, and more so as there may be other matters where Mr Foso may have conducted himself in the same or similar fashion.

The powers of this Court on review

[40] In terms of section 304(4) of the CPA, this Court is vested with the same review powers applicable to reviews transmitted in terms of section 303 of the CPA. Section 304(2) of the CPA resultantly provides the following powers on review, if it appears to the judge inter alia, that the proceedings are not in accordance with justice:

“(2) (a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before

the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction of sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial or local division having jurisdiction the judge may lay the record of the proceedings before that court without obtaining the statement

of the judicial officer who presided at the trial.

(b) Such court may at any sitting thereof hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article.

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312—

(i) confirm, alter or quash the conviction, and in the event of the

conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;

(iii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;

(iv) set aside or correct the proceedings of the magistrate's court;

(iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or

(v)

remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local

division may think fit; and

(vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such

person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such

person as to the court seems likely to promote the ends of justice.”

Discussion

[41] The child offender has, in the interim, been released on parole on 13 April 2023, having served just over four (4) years of the eight years imprisonment imposed in terms of section 276(1)(i) of the CPA, which Mr Foso confirms he imposed. This sentence is also reflected on the J15 and the SAP 69. A very disconcerting and serious contradiction in the assertion of Mr Foso that he imposed the sentence as aforesaid as reflected on the J15, is the evidence on oath by Ms Mahomed which is supported by copies from her file. The sentence recorded by Ms Mahomed on her file and in her notes, is eight (8) imprisonment, and not eight (8) years imprisonment in terms of section 276(1)(i) of the CPA. These contradictory sentences raise serious questions about the sentence pronounced by Mr Foso. In the absence of a record of proceedings and the best evidence on the sentence imposed being that of Ms Mahomed, the ineluctable deduction must be that the child offender was in fact sentenced to eight (8) years imprisonment. This has serious implications when regard is had to the fact that the child offender had to be sentenced in terms of the CJA.

[42] Sight cannot be lost of the fact that the child offender served more than four

(4) years of the incompetent sentence of eight (8) years imprisonment in terms of section 276(1)(i) of the CPA imposed by Mr Foso. This is exacerbated by the fact that Rustenburg Correctional Services failed to bring the incompetent sentence to the attention of Mr Foso. If the correct maximum term of five years was imposed in terms of section 276(1)(i) of the

CPA, the child offender would have been eligible to be considered for release

on parole supervision after serving at least one-sixth of the five-year term. In other words, the child offender may have

been eligible for consideration after serving just eight (8) months of the sentence.

[43] Sections 73 and 76 under Chapter VII of the Correctional Services Act 111 of 1998 (“the CSA”) provide as follows:

“CHAPTER VII

RELEASE FROM CORRECTIONAL CENTRE AND PLACEMENT UNDER CORRECTIONAL SUPERVISION AND ON DAY PAROLE AND PAROLE (ss 73-82)

73 Length and form of sentences

(1) Subject to the provisions of this Act -

(a) a sentenced offender remains in a correctional centre for the full period of sentence...

(4) In accordance with the provisions of this Chapter a sentenced offender may be placed under correctional supervision, day parole,

parole or medical parole before the expiration of his or her term of incarceration.

- (6) (a) Subject to the provisions of paragraph (b), a sentenced offender serving a determinate sentence or cumulative sentences of more than 24 months may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but day parole or parole must be considered whenever a sentenced offender has served 25 years of a sentence or cumulative sentences.

[44] When regard is had to the aforesaid highlighted provisions of the CSA, it is clear the child offender having been sentenced to direct imprisonment of more than 24 months, was to remain in the Correctional Centre for the full period of the sentence; subject to the proviso he could not be placed on day parole or parole, and with no non-parole period having been stipulated, until he had served half of the sentence of eight (8) years imprisonment. The ineluctable deduction, having regard to the fact the child offender was released on parole after serving more than four (4) years of the eight-year term, is that sight was lost of the fact that the eight (8) years was, albeit wrongly imposed, in reference to section 276(1)(i), considered by the prison authorities as eight (8) years direct imprisonment. This is clearly how the child offender was treated in terms of the Correctional Services Act 11 of 1998.

[45] Mr Foso was clearly aware that he was dealing with a child offender, as he postponed the matter after conviction, for a Probation Officer's

report. The Probation Officer's report itself screams out that the accused was a child offender and canvasses all the sentencing

options provided for in Chapter 10 of the CJA (at sections 68 to 79). Direct imprisonment or imprisonment in terms of section 276(1)(i) of the CPA is emphasized in the CJA, as being a sentence of last resort. This is echoed by the Probation Officer, Mrs Adeline Anne Bull, in her report dated 26 February 2019 where she states as follows, in not supporting direct imprisonment, relevant to the peculiar facts of the matter:

"10.4 Direct imprisonment in terms of Section 77 of Act 75 of 2008

The child offender is a first offender.

The child offender was 16 years when he committed the offence.

The offence was not planned, it happened as an act of anger and youthful irresponsibility.

As a 16 year old he was under the influence of an older co-accused.

He takes responsibility for committing the crime, and co-operated with court.

The child offender shows remorse for committing the offence.

He did not commit any crime while awaiting trial on this case.

He is not part of a gang or a danger to society.

The child offender committed very serious offences.

An innocent male person was killed and the other assaulted.

The child offender is not a danger to society. The risk of him re-offending is not high, because he does not portray continuous unlawful behaviour.

Though a person lost his life and the other complainant was badly injured and justice needs to be served, a term of imprisonment will not be in line with the personal circumstances of the child offender. No sentence will bring back the deceased person or correct the harm that was done.

Direct imprisonment will be a harsh sentence for the child offender.

In terms of the Child Justice Act 75 of 2008 imprisonment should be the last resort for a child offender.”

[46] Mr Foso in misdirecting himself on sentence premised on section 51(2) and (3) of the CLAA, as indicated above, clearly had no regard to what Ms Bull

opined. In doing so, he clearly was oblivious to the sentencing provisions of the CJA. It would be prudent to highlight the relevant sentencing provisions to demonstrate this assertion. Section 68 provides in peremptory terms, that:

“68 Child to be sentenced in terms of this Chapter

A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.”

[47] Section 69 of the CJA further makes it plain regarding the objectives of sentencing and factors to be considered in general and specifically in relation to direct imprisonment, that:

“(1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to —

- (a) encourage the child to understand the implications of and be accountable for the harm caused;
 - (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
 - (c) promote the reintegration of the child into the family and community;
 - (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
 - (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.
- (4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

- (a) The seriousness of the offence, with due regard to —
 - (i) the amount of harm done or risked through the offence; and
 - (ii) the culpability of the child in causing or risking the harm;
- (b) the protection of the community;
- (c) the severity of the impact of the offence on the victim;
- (d) the previous failure of the child to respond to non-residential alternatives, if applicable;
- (e) the desirability of keeping the child out of prison.”

[48] Regarding a sentence of imprisonment, section 77 of the CJA unequivocally provides that:

“77 Sentence of imprisonment

- (1) A child justice court –
 - (a) ...
 - (b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.
- (3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-
 - (a) Schedule 3;
 - (b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;
 - (c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.
- (4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment-
 - (a) for a period not exceeding 25 years; or
 - (b) envisaged in section 276(1)(i) of the Criminal Procedure Act>.
-
- (5) In compliance with the Republic’s international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.”

[49] It is clearly imperative to identify on the SAP 69, where direct imprisonment

or imprisonment in terms of section 276(1)(i) of Act 51 of 1977 is imposed, in terms of which section of the CJA such sentence has been imposed. That gives effect to section 77(6) of the CJA.

[50] Turning to rights of appeal and review of a child offender, section 84 of the CJA, makes it peremptory that a child be informed of his right of appeal by the presiding officer. The provisions of section 85 of the CJA were canvassed supra.

“84 Appeals

(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence-

(a)

under the age of 16 years; or

(b) 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended, he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court: Provided further that the provisions of section 302

(1) (b) of that Act apply in respect of a child who duly

notes an appeal against a conviction, sentence or order as provided for in section 302 (1) (a) of that Act.

(2) A child referred to in subsection (1) must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.”

[51] In the absence of the record of proceedings relevant to conviction and sentence, it cannot be determined if Mr Foso complied with the peremptory provisions of the CJA. However, when regard is had to the fact that he misdirected himself on sentence in a myriad of ways, inclusive of the CPA and CLAA, it is irrebuttable that he failed to comply with and deal with the

child offender in terms of the CJA.

[52] The conduct of Mr Foso in this matter, very regrettably, has led to a serious miscarriage of justice, which impacts not only the administration of justice but more importantly failed the child offender.

[53] Section 28 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”) was not given effect to by Mr Foso, in so far as it provides that:

“28 Children

- (1) Every child has the right-
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
- (i) kept separately from detained persons over the age of 18 years; and
- (ii) treated in a manner, and kept in conditions, that take account of the child’s age;”

[54] It is further regrettable that the child offender was denied his automatic right

of review by Mr Foso, which is first and foremost entrenched in section 35(3)(o) of the Constitution and emphasized in section 84 of the CJA. If effect was given to this right, in circumstances where, the lost record would in all

probability have been available at the time of sentencing, the proceedings in all probability would have

been set aside, for the same reasons set out in this review. The travesty of justice to the extent manifest in this matter would have been averted or ameliorated.

Conclusion

[55] In *S v Mthembu* 2012

- (1) SACR 517 (SCA) at paragraph [17], Ponnann JA and Petse AJA (writing for the Court) with due reference to two earlier SCA decisions, namely *Legoa* and *Ndlovu*, stated that ‘a fair trial enquiry does not occur in vacuo, but . . . is first and foremost a fact-based enquiry’ (at [17]). The effect of an incomplete record on appeal, which applies equally to reviews, which impacts such fact-based enquiry, was aptly stated in *S v Chabedi* 2005

- (1) SACR 415 (SCA) at paragraph 5:

‘On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the

conviction and sentence being set aside. However, the 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 ...’ (emphasis added)

[56] The fact-based enquiry as enunciated in Mthembu has been embarked upon in detail above. The record in this matter being incomplete with no transcription or reconstruction of the

record, is inadequate for a proper consideration of the review. The entire proceedings demonstrate a myriad of misdirections in the conduct of the matter, which either individually or cumulatively,

constitute gross irregularities. The injunction in Chabedi is accordingly triggered and the entire proceedings stand to be reviewed and aside.

[57] Mr Foso has alluded to Diniso v S (CA14/22) [2023] ZANWHC 11 (7 February 2023), which on his own account resulted in him being removed

from Klerksdorp Regional Court to Stilfontein Regional Court. In Diniso, this Court highlighted and raised very serious concerns about the conduct of Mr Foso in a sexual offences matter.

[58] It would be prudent in my view, considering the very serious irregularities in this matter, that a copy of this judgment be brought to the attention of the Magistrates' Commission and the Acting Regional Court President, North West Division. A copy of this judgment is also to be brought to the attention of the Director of Public Prosecutions for her consideration. A copy of this judgment is further to be brought to the attention of the Director: Legal Aid South Africa, North West Province. The Court Manager: Klerksdorp Magistrates' Court should similarly be furnished with a copy of this judgment, to address the concerns raised by this Court about the Clerk of Court: Reviews, and the Clerk of Court (stenographer), for corrective action and training purposes.

Order

[59] Consequently, the following order is made:

4. A copy of the judgment is to be brought to the attention of the Director of Public Prosecutions, North-West Province for her consideration.
5. A copy of this judgment is to be brought to the attention of the Director: Legal Aid South Africa, North-West Province.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG

I agree.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

- [1] Chapter 1: Part I 1. Appointments 1.2 (b) Any Assistant Registrar or Clerk of the Court performing duties as a DCRS Clerk as provided for in Rule 66 (2), must take the prescribed oath/affirmation as provided for in Rule 30 (5) (a) before commencement of such duties.
- [2] Section 76(3) of the Criminal Procedure Act 51 of 1977; S v Nyumbeka 2012
- (2) SACR 367 (WCC) paras 20 – 23; the unreported judgment of Thulare AJ, concurred in by Makgoba J, in the North Gauteng High Court, Pretoria, S v Mabena case No A 821/2011.
- [3] Mabena loc cit para 17.
- [4] Paragraph 5.3.4 of the minutes.
- [5] 2017
- (2) SACR 1 (CC) (2017 (5) BCLR 572; [2016] ZACC 50) paras 19 – 21 and 38.
- [6] 2018
- (1) SACR 300 (CC) para 38.
- [7] Id para 62.
- [8] 2008
- (2) SACR 626 (NC) para 19.
- [9] Act 32 of 1944.
- [10] See the insightful article by SS Terblance: The Child Justice Act: procedural sentencing issues. Potchefstroom Electronic Journal PER vol. 16 n.1 Potchefstroom Apr. 2013

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Prepared on 10 October 2026 · Esheria