

SOUTH AFRICA / JUDGMENT

Wessie v S (CA 08/2022) [2023] ZANWHC 88 (22 June 2023)

[2023] ZANWHC 88

COURT

North West High Court, Mafikeng

BEFORE

Djaje, Petersen

CASE / FILE NUMBER

CA 08/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NO: CA 08/2022

Reportable:	YES / NO
Circulate to Judges:	YES / NO Circulate to
Magistrates:	YES / NO Circulate to Regional
Magistrates:	YES / NO
In the matter between:	TSHEPO CLEMENT WESSIE Appellant and THE STATE Respondent
Coram:	Djaje DJP & Petersen J

Heard: 03 March 2023
Handed
down: 22
June 2023

Delivered: This judgment was handed down
electronically by circulation to the parties' representatives
by email. The date and time for
hand-down is deemed to be 10h00AM on
22 June 2023.
ORDER
In the result, the

following order is made: (i)
The application for the
late filing and prosecution of the appeal is condoned.
(ii)
The appeal succeeds and
the conviction and sentence are set aside.
(iii)
The decision on whether
or not to re-instate prosecution against the appellant is left to the
discretion of the Director of Public
Prosecutions, North West.
(iv)
A copy of this judgment
must be brought to the attention of the Director of Public
Prosecutions, North West by the Registrar of
this Court.

JUDGMENT

PETERSEN J

Introduction

[1] The appellant, Tshepo Clement Wessie was charged in the Regional Court, Klerksdorp ('the court a quo') on a charge of murder read with section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 (as amended) before Regional

Magistrate Melodi sitting without assessors.

[2] On 28 August 2019 the appellant was convicted as charged and sentenced to life imprisonment.

[3] The appeal lies against conviction and sentence by virtue of the appellant's automatic right of appeal.

The application for condonation

- [4] The appellant seeks condonation for the late prosecution of the appeal. In light of the conclusion reached in this appeal, there are reasonable prospects of success and the reasons for the application for condonation is immaterial. Condonation for the late prosecution of the appeal is accordingly granted.

The grounds of appeal: Conviction and sentence

- [5] The grounds of appeal against conviction and sentence similarly need not engage this Court in light of the conclusion reached, which is predicated on authorities in this Division.

Section 93ter of the Magistrates Court Act 32 of 1944

- [6] In *Casswell v S* (CA 91/2022) [2023] ZANWHC 14 (18 January 2023) Reddy AJ very succinctly set out the legal position in respect of section 93ter of the Magistrates Court Act 32 of 1944, based on decisions in this Division and other jurisdictions of the High Court of South Africa in which I concurred.

- [7] In my view, there is no need to revisit the law in this regard, save to quote extensively from *Casswell v S* and to apply the ratio therein to the present appeal. The following was said by Reddy AJ:

“[17] Section 93ter (1)(a) of the MCA provides as follows:

93ter Magistrate may be assisted by assessors

- (1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

- (a) before any evidence has been led;

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

- [18] It is apposite to revisit the authorities from the Supreme Court of Appeal, this Division and other Divisions in respect of section 93ter of the MCA. The Supreme Court of Appeal has removed any ambiguity in respect of the interpretation of section 93ter (1) in *S v Gayiya* 2016

- [2] SACR 165 (SCA). In the recent judgment of *Mntambo v S* (478/20)

- [2021] ZASCA 17 (11 March 2021) the ratio in *Gayiya* was re-iterated by the SCA as follows:

“[9] Until the judgment in S v Gayiya there were conflicting judgments in relation to the interpretation of s 93ter (1). This Court in Gayiya referred to Chala and Others v Director of Public Prosecutions, KwaZulu-Natal and Another, stating that the conflicting authorities had been succinctly dealt with in that case. In Gaviva, it was held that the appointment of assessors was peremptory, unless the accused requests, prior to him pleading to a charge of murder that the trial should proceed without assessors. Mpati P stated:

‘In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors. unless he (the accused) requests that the trial proceed without assessors.

...

[10] The court held that the failure to comply with the proviso resulted in the court not being properly constituted and it set aside the conviction and sentence. In Shange v S, Lewis JA referred to and endorsed Gayiya. She stated:

‘In S v Gayiya 2016 (2) SACR 165 (SCA) this court, referring to Chala v DPP, KwaZulu-Natal 2015 (2) SACR 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not sat with assessors, and the accused had not requested that the trial not proceed with assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.

[11] In the present matter, it is clear from the record of the proceedings that the a appellant was not afforded an opportunity by the magistrate to decide whether to request that the trial proceed with or without assessors before he was asked to plead. It is common cause that there was non-compliance with the proviso to s 93ter (1) of the Act in that no assessors were appointed in terms of the proviso to the section and the appellant did not waive his right to such appointment. This is a fatal misdirection which vitiates the proceedings. The State properly conceded the point and accepted that the conviction and sentence should be set aside and the appellant immediately released from prison. The appeal must therefore succeed “

(my emphasis and underlining)

[19] In Tsietsi Mmusi v The State (Case No: CA55/2020), an unreported judgment of this Division, Petersen J postulates the following on the application of section 93ter at paragraphs [11], [13] and [14]:

[11] The trial record reads as follows on the issue of the appointment of assessors:

“COURT: Part II schedule 2. Let us deal with the assessors first. In your opinion, is there any need for assessors in this matter?”

PROSECUTOR: No.

MR TLATSANA: None Your Worship.

COURT: Okay. I am of the opinion that it is not expedient in the administration of justice to have assessors appointed to assist this court. Part II schedule 2. Right. If this court convicts you of the offence of murder sir, then a term of imprisonment for a first offender of 15 years shall be, of not less than 15 years shall be imposed upon you. For a second offender it is not less than 20 years. For a third and subsequent offender of not less than 25 years. Do you understand?

ACCUSED: Understood Your Worship.

(my emphasis)

[13] The appellant was not afforded an opportunity by the regional magistrate to indicate if he wanted the trial to proceed with assessors or not. The submission by his legal representative did not suffice for purposes of section 93ter (l)(a) of the MCA. The authorities from the Supreme Court of Appeal, by which this Court is bound, are clear, in that it constitutes a fatal misdirection which vitiates the proceedings.

[14] The failure to comply with section 93ter(1)(a) in accordance with the authorities of the Supreme Court of Appeal has serious implications. It results in the trial being rendered unfair and a failure of justice. In the present matter it is clear that the issue of the assessors was only raised on the date of trial. It may be prudent that this very important issue be raised as early as the disclosure stage when copies of the docket and charges are discovered to the defence. Otherwise put it should be a crucial consideration during the pre-trial procedure before setting a trial date. It should be emphasized that what is required to give effect to the provisions of section 93ter(1)(a) of the MCA is essentially a brief enquiry where the accused is fully appraised of the implications of the said section. so as to make an informed decision.’

[20] The approach adopted in Mmusi is not novel in this Division. In fact, the prevailing law in this Division which echoes the law in the SCA, is succinctly set out in the unreported judgment of Van Staden v S (CA21/2017) [2018] ZANWHC 82 (26 April 2018), where Gutta J said:

“[6] On reading of the foregoing provisions it is clear that Section 93 is couched in peremptory terms, namely that a judicial officer "shall" be assisted by two assessors unless the accused who is charged with murder requests that the trial proceed without assessors. Hence the appointment of assessors is compulsory unless the accused, prior to pleading, waives the need for assessors.

- [7] The starting point therefore is for the Regional Magistrate to inform the accused before the commencement of the trial about the provisions of Section
93. It is only where an accused requests that the trial proceed without assessors, that the judicial officer becomes clothed with a discretion either to summons one or two assessors to assist him or to sit without an assessor.
- [8] The appellant was not informed by the Regional Magistrate of his right to have assessors appointed and was not called upon to make a choice whether or not to request that the trial proceed without assessor before he was asked to plead to the charges.
- [9] Counsel for the State, Mr Moeketsi conceded this point and relied on the case of *S v Nhlapo and Others* to submit that failure to appoint assessors constitutes a gross irregularity. Mr Moeketsi submitted that because of the irregularities, the sentences of fifteen (15) years and life imprisonment imposed by the Court a quo should be set aside and that the proceedings should be declared void ab initio and should commence de novo before another presiding officer.”
- [21] The authorities in this Division which accords with the authorities of the SCA prevails in, inter alia, the Eastern Cape and Kwa-Zulu Natal. In *S v Langalitshoni* 2020 (2) SACR (EMC) by way of comparison, where one of the counts was murder, the following transpired between the Regional Magistrate and the legal representative of the appellant without engaging the appellant which the Court found vitiated the proceedings:

“[4] The magistrate then addressed the legal representative of the appellant in the following manner:

“Yes [name], as I said there is no pre-trial conference, according. to the charge sheet yes, among the counts there is a murder count, where the assessors are supposed to be there, are you going to use the services of the assessors?”

The response was:

“No, your worship.”

- [8] The statement of the legal principle quoted in the preceding paragraph has the effect of creating an obligation on the part of a regional magistrate presiding over a trial involving a charge of murder. There are two essential obligations. The first is to inform the accused before the commencement of the proceedings what the peremptory

provisions of the law require to ensure the proper constitution of the regional court. The second element is to inform the accused

person that he or she may elect to proceed with the trial without assessors.

- [9] In my view, it is a relatively simple matter for a regional magistrate to discharge both elements of the obligation. What is required is a repetition of the legal principle quoted elsewhere in the judgment. Ideally. the communication of the legal principle should be made in a direct manner by the magistrate addressing the accused person, who should be

asked at that stage to indicate whether or not he or she has been aware of the peremptory provisions. The legal representative of the accused person may then be asked by the magistrate to confirm the correctness of the answer given by the accused person. It is then necessary for the magistrate to ask specifically whether the accused person wishes to permit the trial to proceed without assessors. At this point a magistrate would not be criticized for giving a brief outline of the role played by assessors in a criminal trial. The magistrate ought to be satisfied that the answer given by the accused person demonstrates an appreciation of the nature of the question and reflects a reliable response in the circumstances. The accused person has a right to be tried in a fully constituted court. An election to proceed without assessors amounts to a waiver of such right. A waiver of a right cannot be achieved without knowledge thereof. That this is so should be checked with the accused and the legal representative.

- [11] In asking “are you going to use the services of the assessors”, the magistrate is not conveying to the appellant that the proper constitution of the court requires that the magistrate ordinarily sit with two assessors. The question posed suggests that the court is constituted ordinarily by the regional magistrate sitting alone. It conveys the suggestion that the appellant’s legal representative has a right to request the participation of assessors as an additional ‘service’... what is required is an indication of whether or not the appellant elected to waive an existing right. One cannot simply assume that, because of the preamble contained in the magistrate’s questioning, one can accept that both the magistrate and the legal representative knew that the right created thereby could be waived by the appellant and that the legal representative of the appellant was indeed unequivocally waiving the right created by the section. It is also of concern that the appellant was not addressed personally by

the magistrate and that the correctness of his or her answer was not thereafter confirmed by the legal representative.’

- [22] In *Nxumalo v s* (AR263/2019 RC51/2013) [2022] ZAKZDHC 23 (10 February 2022), Lopes J adopted a similar approach with reference, inter alia, to *Langalitshoni*, where he said:

“(4) *The record reveals that:*

- (a) on the 26th September 2013, Mr Zulu was appointed as the new attorney for both Mr Nxumalo and Mr Mdluli. The typed version of the record states that:

‘Mr Zulu informed the court that the defence does not require the assessors.’

- (b) on the 9th December 2013, a pre-trial conference was held, and opposite the word ‘Assessors’ appears the manuscript recorded that ‘Defence does not need assessors’. There is no indication that the pre-trial meeting was held in the presence of either the learned magistrate or Mr Nxumalo; and

- (c) When the trial commenced on the 31 st March 2014, the following was recorded:

(d)

‘COURT Advocate Zulu maybe if you could just confirm this - that the defence does not require the assessors. I know that is what transpired during pre-trial conference. Is that still the position, they do not require?’

MR ZULU Yes, that is correct, that is still the position.’

- [5] Nothing further was said on that subject, and Mr Nxumalo was not asked to confirm what his attorney had said, nor whether he wished to add anything. The authorities make it clear that the proviso to s 93ter(1) sets out the manner in which the court is normally to be constituted - the magistrate and two assessors, and unless an accused person requests the court not to sit with assessors, the court will not be properly constituted without assessors.
- [6] In *S v Du Plessis* 2012 (2) SACR 247 (GSJ), the court set out the importance of assessors, and found that the failure to consider to appoint assessors rendered the trial a failure of justice. The court, however, indicated that it would be sufficient to determine whether the need for assessors would be waived, if the presiding officer were to enter into discussions with the accused or his legal representative.
- [9] The crisp issue which arises in this matter is whether the communications with regard to the appointment of assessors between the prosecutor and Mr Zulu (in the pre-trial hearing), or the exchange in court between the learned magistrate and Mr Zulu were sufficient. Mr Nxumalo himself, was not involved in these discussions, save for being present when the learned magistrate spoke to Mr Zulu.
- [10] The proviso was never explained to Mr Nxumalo, and he never made a request not to sit with assessors. Whether his legal representative explained the proviso to him, is also not reflected on the record. Had that been the case, the learned magistrate could have engaged Mr Nxumalo so that he could have confirmed his understanding of the section, and his request not to have assessors.

See too: *Hlatshwayo and Another v State* (AR 354/20) [2022] ZAKZPHC 8 (28 March

2022) at paras [41]- [17]; *Zulu v S* (AR 319/2021) [2022] ZAKZPHC 20 (13 May 2022) at paras [15]- [30].”

- [8] In the present matter the Regional Magistrate, Mr Melodi sat without assessors. The record is silent on the provisions of section 93ter. The absence of any explanation or engagement on section 93ter, whether at the pre-trial conference or during trial before the appellant pleaded to the charge is analogous to what transpired in *Van Staden v S* supra.

Conclusion

- [9] In *Caswell v S* the following was said in respect of the way forward in circumstances where the conviction and sentence is vitiated by a gross irregularity in the proceedings:

“[30] The improper application of section 93ter(1)(a) of the MCA has consequences. It tainted the trial in that it resulted in a gross violation of the appellant's right to a fair trial. This domino effect of form over substance vitiates the proceedings.

[31] In Van Staden the Court dealt with the way forward upon setting aside the conviction and sentence, as follows:

“[12] On the issue of the matter being referred back to Regional Court for trial de novo, the Court in Khambule v The State (Bophuthatswana Provincial Division (CA No 2013/04) supra at paragraph 7.10 said the following:

“7.10 This brings us to the respondent's submission that the matter be referred back for trial de novo before a different Magistrate. In S v Balatseng 2005(2) SACR 28 (Bophuthatswana Provincial Division), an application was made on behalf of the State that the matter be referred to a trial de novo, and this application was opposed. After several cases were considered the following was said at 39E-F by Mogoeng JP: "such an order should be made only when all parties to the appeal agree that the accused be tried de novo. The only instance where it is permissible to order that a trial should start de novo without first securing the agreement of the accused is in the case of an automatic review.

7.10 Again at 39 (3-1 of the Balatseng case supra, Mogoeng JP stated that the provisions of section 322(1)(c) of the Criminal Procedure Act 51 of 1977 empowered the Court to make such an order as would serve the interests of justice. However, where the Court had determined that the trial proceedings were irregular and where it was not necessary for consideration of the merits of such case, the Court would not order a trial de novo in the absence of an agreement by the parties to the appeal. In this way the accused would be afforded the opportunity to raise such defence/s he may wish to raise at a retrial.

The Court was not made aware that an agreement had been secured by the parties.”

[13] In casu, counsel for the appellant, Mr Setumu agreed that the matter could be referred back to the Court a quo to commence proceedings de novo.”

[32] In a recent unreported review judgment in this Division, S v Patrick Thabo Masokane, S v Tebogo Bokaba and S v Jobias Mokone (Case Numbers RE 91/2021, RE 884/2022 and RE-481/2022) (25 November 2022), Petersen J with Hendricks JP concurring, dealt with the issue as follows:

“[14] The proceedings in the implicated cases accordingly stand to be set aside. The sentiments expressed in S v Van Eeden at paragraphs [48] to [51] resonate with me and I propose to adopt the same approach in my order. Olivier J said the following in this regard:

“[48] The next question is whether this Court should then remit the matter to the Regional Court and order that the accused be tried de novo. This is the order initially suggested by Ms Makhaga.

[49] Although such an order is quite common in cases where proceedings are set aside, it has often been held to be undesirable. In *S v La Kay* it was held that the provisions of section 324 of the Criminal Procedure Act provided the prosecuting authority with a discretion to decide whether to charge an accused again and that an order that an accused be tried de novo would interfere with that discretion.

[51] If it is decided to prosecute the accused again the trial should, in view of the fact that the present Regional Magistrate has heard evidence on the merits, be conducted before a different Regional Magistrate. This would be consistent with the proviso to section 324 of the Criminal Procedure Act in cases where a conviction and sentence are set aside. Ms Makhaga also made the valid point that the accused would, in the event that he is again faced with the same charges, be entitled to reconsider his plea and his instructions to his legal representative,

and that a trial before the same Regional Magistrate would compromise that right. The prosecution may also be prejudiced, because the Regional Magistrate may already have formed an unfavourable opinion regarding the demeanour of a prosecution witness.”

[10] In my view the most prudent order in the present appeal would be the same as that in *Caswell v S*.

Order

[11] In the result, the following order is made:

(v) The application for the late filing and prosecution of the appeal is condoned.

(vi) The appeal succeeds and the conviction and sentence are set aside.

(vii) The decision on whether or not to re-instate prosecution against the appellant is left to the discretion of the Director of Public Prosecutions, North West.

(viii) A copy of this judgment must be brought to the attention of the Director of Public Prosecutions, North West by the Registrar of this Court.

A H PETERSEN

JUDGE OF THE HIGH COURT

I agree

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES:

For the Appellant: Adv HC du Plessis Instructed by: Bosman & Bosman Attorneys c/o Labuschagne Attorneys 19 Constantia Drive Riviera Park Mahikeng For the Respondent: Adv F T Tlatsana Instructed by: The DPP, Mmabatho MegaCity Complex East Gallery 3139 Sekame Road Mmabatho

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