

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A611/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

SIGNATURE:

DATE: 28/04/2023

In the matter between:

XOLANI SEYISI

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MOSOPA, J

INTRODUCTION

[1] The appellant in this matter was sentenced to a period of ten (10) years imprisonment, following his conviction on a charge of murder, by the Pretoria Regional Court on 8 June 2009.

[2] At his trial, the appellant was legally represented for what will become clear later in this judgment.

[3] Leave to appeal to this Court was with leave of the court *a quo*.

BACKGROUND

[4] The appellant was represented by Adv. Westebaar, but from the record it is not clear who the instructing attorney was.

[5] After conviction and sentence of the appellant, he instructed J.S. Joka Attorneys, who brought an application for leave to appeal and bail pending appeal, both of which were successful in the court *a quo*.

[6] The appeal matter was enrolled for hearing in this court to be heard on 3 February 2022. On that date, the matter served before Millar J and Noncembu AJ, wherein the appellant was represented by Mr. Kgagara (who still represents the appellant in this matter) and an order was made in the following terms:

6.1. That the appeal be postponed *sine die*;

6.2. The matter be referred back to the Regional Court Pretoria;

6.3. The Clerk of the Court to transcribe the evidence of Fundisile Tshwili;

6.4. The evidence of Fundisile Tshwili and Christiaan Maxwell Tshwili was not recorded, the Magistrate, the State prosecutor as well as the appellant's legal representative reconstruct the evidence of the witnesses in the presence of the appellant. (*sic*)

[7] When the matter served before this Court on 31 January 2023, the order of Millar J and Noncembu AJ had not been complied with and the court record was not reconstructed as ordered.

[8] Mr. Kgagara referred this Court to the letter dated 6 June 2022 from the Pretoria Magistrate's Court, in which it was recorded that the presiding Magistrate Booysen

has since retired and Magistrate Bekker, who did not preside over the matter, was asked to assist in the reconstruction of the record. The letter further noted that Magistrate Bekker instructed the Clerk of the Court to contact J.S. Joka Attorneys, but the Clerk could not reach them on the contact numbers provided.

[9] However, it is concerning that the letter also made reference to Kwená Peter Tlabela (“Tlabela”), who is not a party to the current proceedings, nor was he a co-accused in the court *a quo*. Despite this name however, the case number referred is the correct case number, as in this appeal and the court *a quo*.

[10] This appeal matter was then stood down further to 10 February 2023, for the Clerk of the Court to clarify whether the name mentioned in the letter, Tlabela, is correct, so as to ascertain whether the letter related to the appeal matter before this Court. The Clerk of the Court responded to the query in a letter dated 9 February 2023, stating the following:

“I have exhausted all searching options for the transcript for outstanding evidence, I asked Magistrate Bekker to assist with reconstruction of evidence as Magistrate Booysen is not working anymore. Magistrate Bekker requested that we ask legal representatives for Xolani Seyisi (appellant) to come and talk about the reconstruction. I have been trying to call the attorney J.S. Joka Attorneys 0[...] after numerous attempts to get hold of the attorney I need way forward from HC (High Court) and DPP (Director of Public Prosecutions).”

[11] The letter is the same as the one dated 6 June 2022, save to mention this time that the name Tlabela was not referred to in the letter. The essence of the letter is that the reconstruction of the record could not be done and the evidence of Mr. Fundisile Tshwili and Mr. Christiaan Maxwell Tshwili remains missing from the record and thus the record is incomplete.

ISSUE FOR DETERMINATION

[12] In this appeal, the record cannot be reconstructed and remains incomplete and, for that reason alone, the appeal should succeed and the conviction and sentence be set aside.

ANALYSIS

[13] 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. (See ***S v Schoombie 2017 (2) SACR 1 (CC)*** at para 19).

[14] *In casu*, it is clear that the order of Millar J and Noncembu AJ, on 3 February 2022 was not complied with when the matter served before this Court on 31 January 2023 and 10 February 2023.

[15] The Clerk of the Court relies on the following aspects as reasons for failing to reconstruct the record, namely that;

(a) the presiding Magistrate has since retired, and;

(b) the legal representative who represented the appellant cannot be traced, J.S. Joka Attorneys.

[16] From the record, it is clear that Adv. Westebaar is the one who represented the appellant throughout his trial and J.S. Joka Attorneys only came on record after the finalisation of the trial matter, and Adv. Westebaar's contact details can be gleaned from the transcribed record. It is important to note that the missing evidence of Mr. Fundisile Tshwili and Mr. Christiaan Maxwell Tshwili is the evidence which was led at trial, not at the leave to appeal stage, so even if J.S. Joka Attorneys was traced, he or she could not have been of assistance with the reconstruction of the incomplete record, as he or she did not represent the appellant at the trial stage.

[17] Adv. Westebaar is clearly mentioned in the record, however there is no indication in the letters dated 6 June 2022 and 9 February 2023 that the Clerk of the Court attempted to contact Adv. Westebaar.

[18] Secondly, the order is clear, as the presiding Magistrate is the one who is ordered to participate in the reconstruction of the incomplete record. The Clerk of the Court only indicates that the presiding Magistrate is retired and does not provide any further detail. The fact that a Magistrate has retired does not bar him or her from participating in the reconstruction of the record of matters he or she has presided over. Following the letter from the Clerk of the Court, it is our considered view that the Magistrate who presided over the matter is still alive and should participate in the reconstruction of the court record.

[19] The evidence of one of the witnesses for the State, Ms. Litabe, is complete and that of the defense witness Mr. Mabokela. Both Mr. Fundisile Tshwili and Mr. Christiaan Maxwell Tshwili were initially accused in the matter and the charges against them were withdrawn by the State. Mr. Fundisile Tshwili was warned in terms of the provisions of section 205 of Act 51 of 1977, and testified on behalf of the State and Mr. Christiaan Maxwell Tshwili was called as a court witness in the interest of justice by the presiding Magistrate. It is important for their evidence to be in the record of the proceedings of the court *a quo*.

[20] It is clear from the above that this matter cannot be classified as one in which the record cannot be reconstructed as it is clear that the Clerk of the Court was either in complete dereliction of his or her duties or did not understand the order of Millar J and Noncembu AJ. It is for that reason that the appeal cannot succeed, but rather that the order of Millar J and Noncembu AJ should be enforced, by involving the presiding officer Booysen, the State prosecutor, Mr. J.A. Maaga and Adv. Westebaar in the reconstruction of the record in the presence of the appellant.

ORDER

[21] Consequently, the following order is made;

1. The appeal is postponed *sine die*.
2. The Clerk of the Court is to reconstruct the evidence of Fundisile Tshwili and Christiaan Maxwell Tshwili, and Magistrate Booysen, the State prosecutor, Mr. J.A. Maaga who dealt with the matter, as well as Adv. Westebaar, who represented the appellant in his trial, participate in the reconstruction of the missing evidence of the witnesses, in the presence of the appellant, so as to give effect to the order of Millar J and Noncembu AJ dated 3 February 2022.
3. The Clerk of the Court, Pretoria Magistrate's Court is to provide a complete update on the progress of the matter on or before 31 May 2023.
4. Until such time that the process mentioned in paragraph 3 of this order is finalised, the matter may not be set down for hearing; in the alternative, if the Clerk of the Court does not provide an update on 31 May 2023, the Clerk of the Court must give full reasons for his/her failure to do so, within 5 days after the lapse of such period.

MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

I agree,

M GREYVENSTEIN
ACTING JUDGE OF THE
HIGH COURT, PRETORIA

APPEARANCES

For Appellant: Mr. M.B. Kgagara

Instructed by: Legal Aid SA

For Respondent: Adv. C. Pruis

Instructed by: The DPP

Date of hearing: 10 February 2023

Date of delivery: Electronically transmitted