

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

High Court Review Case No:	4/07
Magistrate Case No:	F 150/04
Date delivered:	2008-11-07

In the review matter of:

THE STATE

versus

RUDOLF VISAGIE

ACCUSED

Coram: BOSIELO AJP *et* MAJIEDT J

JUDGMENT ON REVIEW

MAJIEDT J:

1. The office of the Clerk of the Magistrate's Court in Upington is notoriously sloven when it comes to court records, files and tapes. To my knowledge this must be the seventh or eighth case where the court tapes or the court record or a file has gone missing. My colleagues in this Division have all come across this phenomenon at one time or another. The inevitable outcome regrettably, as is the case here, is the setting aside of a conviction/s and sentence/s. This state of affairs is a serious blot on the integrity of the justice system and requires urgent intervention – something which I hope to set in motion at the end of this judgment.

2. The accused stood trial on a contravention of sec 31(1) of the Maintenance Act, 99 of 1998, as amended (*"the Act"*), i.e. failure to pay maintenance in accordance with a court order. He was convicted and sentenced as long ago as **21 September 2004** to one year imprisonment suspended for 5 years on certain conditions, *inter alia* that the accused settles the arrear amount of R1200.00 at R200 per month and further also that he pays diligently the maintenance as originally ordered in the amount of R200.00 per month.
3. According to the Registrar's date stamp, the matter was received on review at this Court only on **15 January 2007**. It was accompanied by a covering memorandum of the Magistrate who presided in the matter. In the memorandum the Magistrate states that she cannot give account of what had happened to the tapes and that, since the matter had been heard in September 2004, she was unable to reconstruct the record. The Magistrate conceded however *"that the sentence that was imposed was reviewable and too harsh as (the accused) was a first offender and the outstanding maintenance was only R1200,00."* She requested that the conviction and sentence be set aside and for the trial to start *de novo*. An explanation for why it took two years and four months for the matter to be sent on review, is glaring in its absence.
4. Mokgohloa AJ addressed an enquiry to the Magistrate in the following terms on **23 January 2007**:

“The magistrate is requested to give full reasons for conviction and sentence. Such reasons to include:

1.1 It is not clear from the hand written notes whether the accused’s rights to legal representation and other rights were fully explained to him. If not

1.1.1 Were the proceedings in accordance with justice?

1.2 What steps were taken by the Magistrate to search for the tapes and or the record of the proceedings?

*VIDE S v Leslie 2000(1) SACR 347 (W)
S v Zondi 2003(2) SACR 227 (W).”*

5. This enquiry was forwarded to the Magistrate by the Clerk of the Court on **5 February 2007**. The Magistrate’s response was received only on **20 August 2008** by the Registrar’s office. In this response, the Magistrate states that, at her request, the Clerk of the Court at Upington has diligently searched for the tapes, to no avail. She also alludes to the fact that the prosecutor who had appeared in the matter has passed away. The handwritten notes, as appears in typed form on the record, is the only record of the proceedings. The Magistrate stated further that, based on the admissions made by the accused, he was convicted as charged and that, in sentencing the accused, she took into account his income and expenses as per Exhibit “A” (which did not form part of the record on review).
6. On **20 August 2008** I addressed a further review enquiry as follows:

“Further attempts should be made to find the missing record in this case. If these attempts prove to be unsuccessful, it must be recorded in an affidavit to be forwarded to the Registrar of this Court.

There should be further attempts to reconstruct the record with the assistance of the accused, Mr. Visagie. If this cannot be done, it should be recorded in an affidavit.

Not enough has been done to reconstruct the record – compare the cases referred to by Acting Judge Mokgohloa, viz

***S v Leslie 2000(1) SACR 347 (W);
S v Zondi 2003(2) SACR 227 (W).***

7. On **23 October 2008** the Clerk of the Court at Upington deposed to an affidavit stating that the tapes cannot be found, despite a diligent search during December 2004 and again during August 2008. It appears from her affidavit that the initial delay in sending the matter on review was due to the fact that the tapes could not be found in December 2004. In response to my enquiry, she reported that the accused cannot be traced as he no longer worked at the address reflected on the initial summons, a fact which was confirmed in writing by his erstwhile employer.
8. Consequently and in summary, the record on review is incomplete and cannot be reconstructed. It is therefore impossible to consider and adjudicate the review meaningfully. Ordinarily, the setting aside of the conviction and sentence should follow.

Compare:

S v Sebothe and others 2006(2) SACR 1 (T) at para [8];

S v Mcophele 2007(1) SACR 34 (E);

S v Miggel 2007(1) SACR 675 (C).

9. Automatic review is statutorily entrenched and where a review record cannot be reconstructed at all, thus frustrating an accused's right to automatic review, the conviction and sentence **must** be set aside.

Compare:

S v Leslie 2000(1) SACR 347(W) at 353 D-E.

10. In the premises the conviction and sentence must be set aside in this matter.
11. I deem it necessary to refer this judgment to the Regional Director of the Department of Justice and Constitutional Development in Kimberley and to the Cluster Head of the Magistrates' Courts for the Gordonia region. A full investigation is in my view warranted into:
 - a) the inordinate delay in forwarding this matter on review; and
 - b) the reason/s for the frequent loss of court tapes, court records and court files by the Clerk of the Magistrate's Court at Upington. I must point out that I am aware of the following cases where similar problems had arisen in that office:
 - i) **Makhosandile Mhlakova v The State**, CA&R 136/06, judgment delivered on 17/11/2006.

- ii) **State v Hilton Williams**, review case 10/2007, judgment delivered on 2/3/2007;
- iii) **State v Milton Diston**, review case 9/2007, judgment delivered on 2/3/2007.
- iv) **State v John Moya**, review case 68/2007, judgment delivered on 13/8/2007;
- v) **State v Frans van Staden**, special review case 105/2007, delivered on 28/3/2008.

12. This recurring carelessness is causing great damage to the administration of justice in the Uppington area and intervention is called for as a matter of the utmost urgency.

13. I would issue the following order:

A. THE ACCUSED'S CONVICTION AND SENTENCE ARE SET ASIDE.

B. A COPY OF THIS JUDGMENT MUST BE TRANSMITTED TO:

I) THE REGIONAL DIRECTOR OF THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT IN KIMBERLEY; AND

II) THE CLUSTER HEAD OF THE MAGISTRATES'

COURTS FOR THE GORDONIA REGION.

**SA MAJIEDT
JUDGE**

I concur and it is so ordered.

**LO BOSIELO
ACTING JUDGE PRESIDENT**