



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR361/2022

In the matter between:

LUCKY MTHETHWA

APPELLANT

and

THE STATE

RESPONDENT

ORDER

MOSSOP J: (HARRISON J concurring)

[1] In a covering letter that accompanied the appeal record in this matter, the presiding regional magistrate identified a portion of the record that he viewed as being incomplete. In this regard, he directed this court's attention to indexed page 158 of the record. It appears that a small portion of the record is, indeed, incomplete at that page.

[2] But unfortunately, the regional court magistrate failed to notice a much larger portion of the record that is missing.

[3] Proceedings on 16 October 2019 commence at indexed page 58. At indexed page 88, line 6, it is recorded that the State had no further questions for its witness, Ms Nombulelo Samkele Sithole (Ms N Sithole), and Mr Chamane, the legal representative acting for the appellant, was due to commence his cross-examination of her. Mr Chamane requested a short adjournment from the court to take instructions and the court agreed to take the tea adjournment to allow him to take those instructions. Nothing further then appears in the record relating to the anticipated cross-examination.

[4] At page 89 of the record, the following annotation appears:

‘[Transcription note: No proceedings recorded after the adjournment and/or not received for transcription].’

MATTER POSTPONED UNTIL [NOT ON RECORD]’

[5] The record recommences on 24 October 2019, where the public prosecutor states the following:

‘Appearances are the same as before. The matter is partly heard before this Court, Your Worship. I believe it was remanded until today for the defence case.’

The appellant was then called to the witness box by his legal representative and gave his evidence.

[6] There is, thus, no recordal of the cross-examination of Ms N Sithole. During the evidence of the appellant there was frequent reference to things that she apparently said that do not appear in her evidence in chief and can, therefore, only have been mentioned by her in cross-examination.

[7] The audio recording of the cross-examination of Ms N Sithole on 16 October 2019, and any other witness called by the State after she concluded her evidence, must be located and transcribed.

[8] If a transcript cannot be prepared, then the full record of what occurred on 16 October 2019, and on any other day of hearing before 24 October 2019, must be reconstructed. Included in this order of reconstruction is that portion of the record at

indexed page 158 mentioned by the regional magistrate. The reconstruction is to be done in accordance with the guidelines set out in:

- (a) *State v Leslie* 2000(1) SACR 347 (W);
- (b) *State v Zondi* 2003(2) SACR 227 (W); and
- (c) *State v Zenzele* 2009(2) SACR 407.

[9] If necessary, the use of secondary evidence as well as the use of an alternative stenographer to reconstruct the record may be employed.

[10] The reconstruction of the record is to occur before the complete appeal record is returned to this court but must be addressed as a matter of extreme urgency.

[11] In the event of the record having to be reconstructed, the presiding regional magistrate, the clerk of the court, the appellant's legal representative at the time of the trial and the public prosecutor are directed to furnish affidavits which are to be handed to the clerk of the court and which shall accompany the reconstructed record, setting out precisely what steps were taken to reconstruct the record. In particular, the regional magistrate must deliver a full explanation setting out why he did not appreciate that the transcript was incomplete, for it is his duty to ensure that a true record of what occurred before him is submitted to this appellate authority.

[12] In the event of the record not being capable of reconstruction, it is directed that the persons identified in the preceding paragraph shall indicate in the aforesaid affidavits the reason(s) why the record could not be reconstructed.

[13] The matter is accordingly adjourned sine die.

MOSSOP J

I agree:

HARRISON J

APPEARANCES

Counsel for the appellant:

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