



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA)**

Review Case Number: RCUMB 87/23

High Court Ref. Number: 217834

In the matter between

The State

and

Luthando Tyali

SPECIAL REVIEW JUDGMENT

NGOQO AJ

[1] This matter came before me as a Special Review from the Regional Court, Mthatha, at the request of Regional Magistrate Mnge for the 'Nullification of the proceedings of the 24 January 2024.' The state case has not been closed yet.

[2] The accused was arraigned in the Regional Court on two charges namely:

- a. Murder read with the provisions of section 51(2) of the Criminal Law Amendment Act¹ (CLAA) as amended.
- b. Attempted murder in contravention of the provisions of section 31 of Act 9 of 1983 read with the provisions of section 51(2) of the CLAA.

[3] Murder read with the provisions of sections 51 (1) or (2) of the CLAA attracts the provisions of section 93ter of the Magistrates Court Act.² (the Act) The section provides as follows;

93 ter Magistrate may be assisted by assessors

- (1) the administration of justice-
- (a) Before any evidence has been led; or
- (b) In considering a community-based punishment in respect of any person who has been convicted of any offence, 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 assessors: Provided that if an accused is standing trial in any regional court on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at the 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.
- (2) . . .
- (3) Before the trial or imposition of punishment, as the case may be, the said judicial officer shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict or a considered opinion, as the case may be, according to the evidence upon the issues to be tried or regarding punishment, as the case may be, and thereupon he or they shall be a member or members of the court subject to the following provisions. . .

¹ Act 105 of 1997

² 32 of 1944

[4] It can be gleaned from the record that on the 15 November 2023, which is the day on which the charges were put to the accused, the Regional Magistrate noted that during his previous appearances the accused indicated that he 'needed assessors.' The magistrate subsequently stood the matter down for assessors to be arranged. Upon resumption, the record shows that the assessors were arranged and were part of the constitution of the court. The proceedings continued until the matter was adjourned to 24 January 2024.

[5] However, on the 24 January 2024, the matter continued without any of the arranged assessors forming part of the constitution of the court. A query was directed to the magistrate about the use of assessors on the said date in the following terms; 'The record shows that the trial proceedings of the 24 January 2024, the trial proceeded without assessors, the record does not reflect whether the accused was informed of the absence of the assessors or not, in that circumstance kindly clarify the following:

- a) Whether the accused was informed of the absence of assessors, especially that the evidence of an expert witness was called.
- b) In the event the accused was legally represented, advise whether the accused's legal representative was made aware of the absence of the assessors, and whether it was established from the accused, whether the trial should proceed without assessors.'

[6] The magistrate responded as follows;

'Further to my minute dated 10 September 2024 I wish to state that the case started on the 15 January 2024 when the accused pleaded not guilty.

The court was assisted by two assessors as stipulated in section 93ter of the Magistrate Court Act and evidence of one Lufuzo Hlokoehla was led by the state. After cross examination the state witness was excused. The case was remanded.

On the 24 January the case proceeded without assessors when Dr. Qaba testified. It is upon this irregularity that the case has been adjourned and matter sent on special review. . . '

[7] The requirement that a judicial officer sits with assessors in the circumstances outlined in the proviso to section 93ter (1)(b) of the Act is peremptory.³

[8] From the reading of the proceedings of the 24 of January 2024, as correctly conceded by the Regional Magistrate, the court clearly did not sit with assessors or an assessor. Neither were the accused, his legal representative nor the state engaged by the court as to whether they agreed to the proceedings being continued with without an assessor or assessors. This clearly, is in violation of the provisions of section 93ter and subsequently constitutes an irregularity which vitiates the proceedings.

[9] Consequently, I make the following orders:

- a) That the proceedings are set aside.
- b) The matter is remitted to the Regional Court for hearing before a different magistrate.

D NGOQO
ACTING JUDGE OF THE HIGH COURT

I agree

B MAJIKI
JUDGE OF THE HIGH COURT

Judgment handed down: 29 April 2025

³ S v Gayiya 2016 (2) SACR 165 (SCA); Chala v DPP, KZN 2015 (2) SACR 283 (KZN) also see Dyantyi v S (CA&R71/15) [2017 ZAECHMC 28 (29 August 2017)]