



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

CASE NO.: 1844/2025

Reportable

In the matter between:

LUZUKO MSESIWE

Applicant

and

THE REGIONAL MAGISTRATE, MR MENE

1st Respondent

**THE MINISTER OF JUSTICE &
CONSTITUTIONAL DEVELOPMENT**

2nd Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

3rd Respondent

THE HEAD OF CORRECTIONAL CENTRE, NGCOBO

4th Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

5th Respondent

REVIEW JUDGMENT

CENGANI-MBAKAZA AJ:

[1] The applicant (accused) was arraigned on a charge of murder in the regional court sitting at Ngcobo. Pursuant to his guilty plea on the competent verdict of culpable homicide, he was convicted and sentenced to a term of 10 years' imprisonment.

[2] This is an application that the proceedings be reviewed and set aside, pursuant to the provisions of s 22 of the Superior Courts Act¹. The gross irregularity complained of is premised on the provisions of s 93ter(1) of the Magistrates Court Act 32 of 1944 (the Magistrates Court Act). This provision relates to the appointment of lay assessors. In the proceedings before us, the accused's legal representative argued that the regional magistrate failed to explain the provisions of s 93ter (1) before the commencement of the trial proceedings.

[3] Although the notice of motion focuses on the provisions of s 93ter (1) of the Magistrates Court Act, the accused's legal representative argued that in the proceedings before it, the court ought to have also invoked the provisions of s 86 of the Criminal Procedure Act² (CPA). Pursuant to s 86 of the CPA, so it was submitted, the charge sheet ought to have been amended before the regional magistrate pronounced on the conviction of a competent verdict of culpable homicide.

¹ Section 22 of the Superior Court's Act 10 of 2013 provides:

'Grounds for review of proceedings of Magistrates' Court

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) ...' [Emphasis added.]

²Act 51 of 1977.

[4] In opposing the application, the third and the fifth respondents' counsel asserted that s 93ter (1) of the Magistrates Court Act was repealed by substituting it with s 2 of Judicial Matters Amendment Act 15 of 2023 (the new provision). Accordingly, so it was contended, s 93ter (1) of the Magistrates Court Act is no longer peremptory, and thus the appointment of lay assessors is in the discretion of the regional magistrate.

[5] Despite this being brought to his attention, the accused's legal representative persisted that even the new provision is couched in peremptory terms. Therefore, he argued, the regional magistrate ought to have explained these provisions and give an accused an opportunity to choose whether the proceedings be held in the presence of lay assessors or not.

[6] The gravamen of the issues before this court relates to the interpretation of the new provisions of s 93ter (1) of the Magistrates Court Act. As a legal principle, the interpretation should align with s 39(2) of the Constitution³, promoting the spirit, purport and objects of the Bill of Rights.

[7] To settle the issues raised, it is apposite to deal with the new s 93ter (1) provision including its predecessor. Before the enforcement of the new provision, the legislation enforced a duty on the regional magistrate to explain the provisions of s 93ter (1) of the Magistrates Court Act to the accused and his/her rights to be assisted by two lay assessors before pleading to a murder charge. This explanation including the accused's response was required to be explicitly recorded in the

³ Act 108 of 1996, the Constitution of the Republic of South Africa.

record of proceedings. Subsection (1) of s 93ter of the Magistrates Court Act provided:

‘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; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his or her assistance any one or two persons who, in his or her 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 or her as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, where 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, where upon the judicial officer may in his discretion summon one or two assessors to assist him.’
(accentuation added)

[8] For a considerable period, prior to the substitution the provisions of s 93ter (1) of the Magistrates Court Act were peremptory rendering non-compliance not only a gross irregularity but also a travesty of justice. This precedent originated as far back as 1955 through a long line of cases.⁴ In *Gayiya v S*⁵, Mpati P (with Wallis, Pillay and Mathopo JJA and Tsoka AJA concurring), at para 8 held:

‘In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section (93ter) is peremptory. It ordains that the judicial officer presiding in a regional court before which the accused is charged with murder (as in this case) *shall* be assisted by two assessors at the trial unless an accused requests that the trial proceed without assessors’.

⁴ See *R v Price* 1955 (1) SA 219 (A); *S v Malinga* 1987 (3) SA 490 (A) at page 495-496.

⁵ 2016 (2) SACR 165 (SCA)

[9] In the past, our courts have emphasised that no evidence should be led without the presiding officer establishing from the accused or his legal representative whether the assessors are requested or not.⁶ With reference to *Gayiya*⁷, the court in *DPP, KZN v Pillay*⁸ reiterated that the magistrate presiding at the trial must bring to the attention of the accused what the provisions of section 93ter require. The accused may request that the trial proceed without assessors.

[10] In terms of *DPP, KZN v Pillay*⁹, where the accused is legally represented such a legal representative who is obliged to act in the best interest of an accused, would be required to advise him/her fully and properly; and guide him/her in exercising those rights which would include advising him/her about s 93ter (1).

[11] Historically, the peremptory provisions regarding the appointment of lay assessors posed challenges, including screening difficulties and delays in appointing these assessors. This impacted the speedy finalisation of cases, particularly in the regional court, where violent crimes like murder cases congest the court rolls. In *S v Papiyana and Another*¹⁰ (Papiyana), the court expressed disapproval of the state's lack of diligence in ensuring lay assessors' availability. Referring to the peremptory provisions of s 93ter (1) of the Magistrates Act, Notyesi AJ at para 11 held,

‘Reasons relating to the lack of human resources cannot be a justification for non-compliance with this section. The comment by the learned Magistrate about lack of human resources is of great concern to this court. The failure by the court manager to timeously arrange for the presence of assessors must be seen and viewed in the light of

⁶ *Booi and Others v s* (ECM) (CA&ER 38/2024) [2024] ZAECMHC 86 delivered on 25 October 2024.

⁷ *Gayiya* at fn7

⁸ 2023 (2) SACR 254 (SCA) at para 8; see also *Monyapheng v S (NWM)* (case no 08/2023) [2024]ZANWHC 65 delivered on 16 February 2024 at para 22.

⁹ Fn 8 above.

¹⁰ (CA&R 19/2021) [2021] ZAECMHC 8;2021(2) SACR 327 (ECM) (23 February 2021).

failing systems. That becomes more compelling, if it is to be inferred that the reasons for the failure to properly comply with s93ter (1) of the Magistrates Court Act may be attributed to the failure on the part of the Department of Justice and Constitutional Development (DoJ) to provide such resources, it follows that the proper functioning of the courts and efficient administration of justice, stand at a risk of being compromised...”[abbreviation added]

[12] The substitution removed the requirement to sit with lay assessors altogether, conferring on the regional magistrate unfettered discretion to decide whether to appoint lay assessors or not. Paragraph (b) of s 93ter of the Magistrates Court Act which was substituted by section 2 of the new provision provides:

- ‘(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; or
 - (b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his or her assistance any one or two persons who, in his or her 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 or her as assessor or assessors’.

[13] The new provision may not necessarily alleviate delays when regional magistrates have exercised their discretion to appoint lay assessors. Therefore, the remarks made in *Papiyana*¹¹ about reinforcing support systems for courts when lay assessors are needed is reiterated. Most significant to note is that, with regional magistrates having discretion in appointing lay assessors, matters waiting for lay assessors’ appointments should decrease, promoting speedily finalisation of cases.

¹¹ Fn 10 above.

[14] Additionally, the new provision promotes fairness, which is constitutionally entrenched, applying to both the state and the defence. It provides legal certainty that the provision of s 93*ter* (1) is no longer peremptory, allowing the state to exercise its discretion, by virtue of powers vested in it, to institute criminal proceedings in murder cases, in any forum as speedily as reasonably possible, without delays caused by the lay assessors' appointments. Allied to that, it aims to reduce the risk of trials being declared a nullity due to procedural flaws, as happened before.

[15] Furthermore, it should be noted that prior to substitution and to date, the peremptory provision regarding the appointment of lay assessors was never a requirement in murder cases tried in the high court. In my view, the substitution of s 93*ter* (1) promotes equality before the law as well as the right to have equal benefit and protection of the law.¹² The accused persons and the potential victims of crime appearing in the regional court should, to a significant extent benefit from the same legal principle applicable in the high court.

[16] Considering the views expressed above, it is clear that the new s 93*ter* provision is unambiguous. Therefore, the argument positing that it is peremptory in nature is unsubstantiated. In the matter under consideration, the trial commenced on 4 February 2025 when the new provision was already in force. It was within the court's discretion to appoint lay assessors. Gleaning from the regional court proceedings, there is no cogent reason to conclude that the regional

¹² Section 9 of the Constitution provides:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

magistrate committed a gross irregularity by not explaining the provisions of s 93ter (1) to the accused.

[17] The remaining issue concerns the regional magistrate's failure to invoke the provisions of s 86 of the CPA. Section 86 of the CPA allows for the amendment of the charge sheet in instances where a charge is defective for the want of an essential averment therein. The provision reads:

'86 Court may order that charge be amended

- (1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend'.

[18] The charge against the accused was read out in court by the public prosecutor, as reflected in the trial court record. To address the issues raised, it is necessary to excerpt the relevant parts of the court proceedings. On page 1 lines 9-16, the charge sheet reads:

'The accused is guilty of the crime of murder, read with Section 51(2) of the Criminal Law Amendment Act 105,1997. In that upon or about 05 October 2024, and at or near Sigangeni A/A in the regional division of the Eastern Cape, the accused did unlawfully and intentionally kill Myezo Quba, a male person by stabbing him with a screwdriver once on the chest.'

[19] The following are the relevant parts of the engagement between the court and the accused's legal representative:

“DEFENCE ATTORNEY: Otherwise, Your Worship, my instructions in the matter are I (sic) plead guilty. However, Your Worship, I plead guilty to culpable homicide in the matter. And Your Worship, we have drafted a statement in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977. And with the leave of the court may I read same, Your Worship, onto record?

COURT: No, no something needs to be rectified.

DEFENCE ATTORNEY: yes.

COURT: He is pleading guilty to murder. You are coming with culpable homicide.

DEFENCE ATTORNEY: Yes

COURT: Your attorney explained what that attorney is saying in terms of his instructions.

ACCUSED: [inaudible]

COURT: Don't bend.

ACCUSED: Confirmed, Your Worship

COURT: Thank you, Mister.

DEFENCE ATTORNEY: Thank you, Your Worship. May I proceed then, Your Worship, to read same for record.

COURT: Yes.

DEFENCE ATTORNEY: Case number RCE03/2025. The state v Luzuko Msesiwe. A statement in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977, reads:

‘I the undersigned do hereby state that I make this statement freely and voluntarily without duress from any influence. I am the accused in this matter being that of culpable homicide. (sic) I admit that on 05 October 2024 at locality in the regional division of the Eastern Cape. I did unlawfully and intentionally kill Myezo Quba. A male person by stabbing him with a screwdriver once in his chest. I admit that on the day in question I met with the deceased and asked him about the earlier argument we had. Where the deceased had assaulted me. I confronted him. When I did, I took my screwdriver. And when I was stabbing him on his shoulder, I stabbed him on his chest instead as he tried to duck. I ran to home and I heard the following day that the deceased had passed away. I admit that my actions were wrongful and punishable by law. I therefore ask for mercy and lenience from the above court when imposing sentence upon me.’

This statement was signed today being 04 February 2025 by the accused as well as the attorney.

COURT: Do you confirm the contents of this statement as being the instructions to your attorney?

ACCUSED: [no response]

COURT: Hey.

ACCUSED: I admit, Your Worship.

COURT: Do you confirm that you are pleading guilty to, not guilty to murder. But guilty to culpable homicide freely and voluntarily and without having been unduly influenced thereto by anybody. And do you also confirm your signature?

ACCUSED: That is correct, Your Worship.”

[20] From the excerpts above, it is clear that the charge sheet disclosed an offence, contained no defective averments and aligned with the evidence presented. Therefore, there is no legal basis to conclude that s 86 of the CPA should have been invoked.

[21] Essentially, there is no legal authority supporting the amendment of the charge when an accused pleads guilty to a competent verdict. As established through court’s engagement, the accused confirmed that his plea to a competent verdict of culpable homicide was free and voluntary with no undue influence. Consequently, the application should be dismissed based on the fact that there was no travesty of justice in the proceedings.

Order

[22] I accordingly make the following order:

- 1. The application for review is dismissed.**

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

I agree:

M MAKAULA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv P Mhlana
Instructed by	:	L. MTHAMBO ATTORNEYS MTHATHA
Counsel for the 3 rd & 5 th Respondents	:	Adv Z Ncalo
Instructed by	:	THE STATE ATTORNEY MTHATHA
Heard on	:	19 August 2025
Judgment Delivered on	:	18 November 2025