



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

CASE NO.: CA&R119/2025

In the matter between:

THE STATE

and

THOBELA NDYEBO

ACCUSED

**JUDGMENT
ON SPECIAL REVIEW**

Zono AJ:

Preface

A civilised judicial system such as the one we are trying to create and maintain demands that no person be unfairly deprived of life, freedom, dignity or property. At the same time criminal proceedings are not a game in which one side is entitled to claim the benefit of any omission or mistake made by the other¹. Therefore, an accused is not entitled to be acquitted on appeal or review because of trifling errors made by the trial court; only errors which in fact led to a failure of justice entitle the accused to such acquittal. Whether a case falls on the one or other side of the line is determined by means of the particular circumstances of the case².

¹ *R v Hepworth* 1928 AD 265 at 277.

² Hiemstra's Criminal Procedure: Page 30-11.

Introduction

[1] The accused was arraigned before the Magistrate Court for the District of Bizana under **Case Number B292/2023** for the charge of assault with intent to do grievous bodily harm. The matter then appeared before Mr Njoza, the Acting Magistrate, for trial. On 14th March 2025 the State closed its case; whereafter the defence applied for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA). Such application was opposed by the state. The court then delivered judgment, which was the outcome of the application in terms of Section 174 of CPA. It is that judgment that resulted in and or prompted this review. The Magistrate found the accused guilty as charged. After the Magistrate had been conscientized of the irregularity³, the defence requested a short adjournment of the matter for a meeting with the Magistrate in chambers, and the matter was so adjourned. Upon resumption the Magistrate announced that there was an error in the court's judgment and for that reason it changed its finding of guilt and found the accused not guilty and discharged him.

[2] Proceedings can only be set aside on review if they were not in accordance with justice. Only an irregularity which infact led to a failure of justice, in contradistinction to potential prejudice, justifies the setting aside of the proceedings⁴.

[3] Section 22 of the Superior Court Act 10 of 2013 provides for the review of proceedings from the Magistrates Courts. The section provides as follows:

“1. The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are—

³ Albeit that the nature of the irregularity was not discussed or divulged in court or on the record.

⁴ **S v Gaba** 1985(4) SA 734 (A).

- (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) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence”.*

The word “any” in subsection 1 is wide enough to include reviews emanating from criminal proceedings. No other interpretation is possible⁵.

[4] The Senior Magistrate, in his referral, is of the view that the Presiding Magistrate overturned his earlier decision finding the accused person guilty and replaced it with a decision finding the accused not guilty, thereby committing a gross irregularity. The review falls within the purview of section 22(1) of the Act. Complainant’s letter annexed to the covering letter referring this matter for special review complains about the fact that the Presiding Magistrate changed its decision without a valid explanation. That underpins the reason for the referral of the matter for a special review.

[5] As alluded to above, it was in the context of an application made in terms of section 174 of CPA that those two conflicting decisions were made. The starting point should be the provisions of section 174 of CPA which provide as follows:

“If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty”.

A verdict of not guilty may be returned only where there is no evidence implicating the accused.

⁵ *SATAWU & Another v Garvas & others* 2013 (1) SA 83 (CC) Para 37.

[6] Only one decision may be taken in terms of section 174 of CPA. The Magistrate must either grant or refuse the application. Once that decision is taken the court becomes *functus officio*⁶. If the court decides to refuse the application in terms of section 174, it must do so, and allow the defence to open its case, with a view to rebut any evidence given against the accused, if so advised. If it grants a section 174 application, that is the end of the matter, the accused in that case must be found not guilty and be discharged. There is no authority for proposition that two decisions may be granted by the same court and co-exist even though they are conflicting with each other. It is very much unprecedented that a Magistrate can take two inconsistent decisions in the same matter and almost at the same time.

[7] *Functus officio* doctrine demands generally that an official who has once discharged his official function by making a decision is unable to change his mind and revoke, withdraw or revisit the decision. It generally applies to a final decisions⁷. In *Casu*, the decision convicting the accused person was final decision, therefore the Magistrate had discharged his office, especially in so far as the finding of guilty is concerned. It was impermissible of him to change his mind and re-examine and revisit that decision. The avenue available to him was to refer the matter to this court to exercise its review jurisdiction, should he found that there was an irregularity of gross nature.

[8] It is trite that Magistrate's Courts are creatures of statute. As, they have no inherent jurisdiction and their powers must be deduced from the four

⁶ *R v Monyamane* 1958 (4) SA 720 (O).

⁷ *MEC for Health, Province of Eastern Cape NO and another v Kirland investments (Pty) Ltd t/a Eye of Laser Institute* 2014 (3) SA 219 (SCA) Para 15.

corners of statute⁸. The Magistrates Court Act 32 of 1944, as amended and the Criminal Procedure Act are relevant sources of power of the Magistrates and Magistrate's Court. Both these two legislations do not confer power to grant two conflicting decisions in one matter almost at the same time. For this reason, the Magistrate exceeded his powers or he exercised a power he did not have. That constitutes gross irregularity in terms of section 22(1)(c) of the Superior Courts Act. Having found that the Magistrate had committed a gross irregularity, I hereinafter commence to deal with each decision and how it amounted to a gross irregularity.

The decision to convict- the first decision

[9] I have indicated above that the Magistrate took his first decision to convict the accused. The Magistrate seemingly intended to find the accused person guilty, regardless of the stage of the proceedings. He stated as follows at page 47 of the record:

“Moreover, this complainant has submitted before the court that even though the complainant have not stated the day, she was assaulted by the complainant[?] in his room and happenly [?] ran to the other room where the child of the complainant was with some of the people staying there and they came to ask the accused person not to continue assaulting the complainant. This shows that assault has been committed” (sic).

It is plain from this excerpt that the Magistrate had accepted that the complainant was assaulted by the accused. This occurred even before the accused could come and give evidence to rebut, if so advised, any piece of evidence adduced against him.

[10] On the same page, the Magistrate said the following:

⁸ *Kondlo v Eastern Cape Developmnet Corporation* 2014 (2) ALL SA 328 (ECM) Para 39; *Ndzululeka v Minister of justice and Constitutional Development and another* (4514/2022) [2025] ZAECMHC 103 (21 October 2025) Para 44.

“If we can remember to the testimony by the complainant, she mentioned that she was assaulted with fists and also the stick although she never divulged what type of stick that was used. To me, by the time the complainant divulged the type of the stick, it was not coming as a new fact because the stick was there, although the stick was not being named as umlungu mabele. Therefore, this court wants to put it clearly that the evidence by single witness is admissible before court. Therefore, this court finds the accused person before court guilty to the offence” (sic).

This excerpt clearly demonstrates that, for all intents and purposes, the Magistrate sought to convict the accused. He found as a fact that the complainant was assaulted by the accused person and further went on to admit the complainant’s evidence of a single witness and on those bases he convicted the accused.

[11] The first decision, as stated above, was taken without the accused having been given an opportunity to give his evidence in rebuttal. That approach by the Magistrate flouted trite principle of natural justice, *audi alteram partem Rule*. The first decision was granted without hearing the side of the accused. That amounted to gross irregularity which is a ground of review. It was legally inapposite to convict the accused at the stage of section 174 application. There is no authority for such approach. The accused’s legal representative advised the Magistrate of the irregularity immediately after the conviction in the following words:

“Your worship, there is something grossly irregular with this judgment. Can we meet in chambers? May I suggest that we meet in chambers” (sic).

The court thereafter accepted the invitation to meet in Chambers and the court was adjourned. The Magistrate adjourned the court because he was made aware of the existence of an irregularity. It is that awareness of the existence of an irregularity that should have prompted the referral of the matter to this court for a special review by the Presiding Magistrate. However, that did not happen. Instead the Presiding Magistrate took a

second decision. In the light of the above, the proceedings are not in accordance with justice even at this stage.

Decision to acquit-The second decision

[12] At this stage I advert to section 165(5) of the Constitution, which provides that:

“5. An order or decision issued by a court of law binds all persons to whom and organs of state to which it applies”.

All orders of court whether correctly or incorrectly granted have to be obeyed until they are properly set aside⁹. The Constitutional Court¹⁰ in *Tasima* aptly put it thus:

“180. The equipoise is tipped by section 172(2)(a), which states:

“The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

This section culls an exception that implies the general rule. Only an order of constitutional invalidity requires confirmation by the Constitutional Court to take force. The general rule is that orders that do not concern constitutional invalidity do have force from the moment they are issued. And in light of section 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside.

The record reveals that a court order or a decision finding the accused guilty was never set aside. It is extant. On the administrative law parlance the following is axiomatic: For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it had legal consequences that cannot simply be overlooked¹¹.

That proposition applies with greater force in cases of court's decisions.

⁹ *Culverwell v Beira* 1992 (4) SA 490 (W) at 494 A-C; *Master of the High Court Northern Gauteng High Court, Pretoria v Motala and Others* 2012 (3) SA 325 (SCA) Para 11.

¹⁰ *Department of Transport and others v Tasima (Pty) Limited* 2017 (1) BCLR (1); 2017 (2) SA 622 (CC).

¹¹ *Ouderkraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) Para 26; *South African Broadcasting Corporation SOC Ltd and others v Democratic Alliance and others* 2015 (4) ALL SA 719 (SCA; 2016 (2) SA 522 (SCA) Para 45.

[13] Notwithstanding the weight of judicial authority to the contrary, the Magistrate, having been advised of the irregularity, took a different and a conflicting decision acquitting and discharging the accused. That happened at the happenstance of the decision convicting the accused. Two decisions which were mutually destructive were granted by one Magistrate in respect of one matter concerning one accused person. Both those orders or decisions are extant. After the adjournment for a meeting suggested by defence Counsel the court resumed. Upon resumption the Magistrate had this to say:

“This court earlier on has made an error by saying accused is found guilty, instead of making a ruling in the application that was made by the defence the application in terms of section 174. The accused person is out on warning. Therefore, in terms of section 174, the accused is found not guilty and discharged” (sic).

That is all that is being said by the Magistrate about the second decision.

[14] The second decision was seemingly granted based on the fact that the accused was out on warning. That lacks basis in law, especially in the context of section 174 application. The Magistrate capriciously took the second decision or order. What about the reasons underpinning the conviction? Are they nullified? This decision is made in the context of section 174 of CPA. Release of an accused on warning is not a basis for the discharge of an accused under section 174 of CPA. The accused can only be discharged in terms of section 174 of CPA if the court is of the opinion that *“there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge¹²”*. The Magistrates power to discharge can only be triggered by the absence of the evidence. Present the evidence, no power to

¹² **S v Heller** 1964 (1) SA 524 (W) at 541 G.

discharge the accused exists. The words *no evidence* in the section mean no evidence upon which a reasonable person might convict accused¹³. It is clear therefore that the Magistrate, when granting the second order considered an irrelevant consideration and a wrong fact¹⁴. It is plain again that the Magistrate did not consider requirements for an application in terms of section 174 of CPA. Therefore, he committed a material error of law¹⁵.

[15] It is demonstrably clear that, except that the accused was out on warning, there were no reasons underpinning Magistrate's decision to acquit and discharge the accused, therefore that decision too was irrational¹⁶. A decision taken without reasons is, as a corollary malicious. An element of malice brings this matter within the purview of section 22(1)(b) of the Superior Courts Act 10 of 2013. The Magistrate took the second decision or order discharging the accused capriciously. The second decision is manifestly not supported by the reasons; therefore, it lacks basis. The Magistrate was lackadaisical in taking that decision or order especially if regard is had to the first decision or order that was supported by pieces of evidence led in the evidence in chief. Contradistinctionally with the first decision or order no reference was made to the evidence led in the evidence in chief and there is manifestly no evaluation of that evidence. There is no doubt in my mind that the second decision or order discharging the accused was arbitrary as the Magistrate took it whimsically. It is therefore evident that the proceedings were not in accordance with justice.

¹³ *S v Khanyapa* 1979 (10 SA 824 (a) 838 F.

¹⁴ Section 22(1) (d) of the Superior Court Act 10 of 2013.

¹⁵ Section 22(1) (c) of the Superior Courts Act 10 of 2013.

¹⁶ *Sikhutshwa v MEC for Social Development, Eastern Cape Province and others* 2009 (3) SA 47 (TKH) Para 69.

[16] One last thing that requires comment is the fact that there were discussions that were held in Chambers which seemingly led to the second decision. There is no detail or whatsoever about those discussions appearing in the record. It is even more murky if the state or the prosecutor was present thereat. That invites comment because Magistrate's Court is a court of record¹⁷. What happened in Chambers is important because it prompted and shaped the second decision. It is axiomatic that such a meeting was suggested by the defence. It could have been prudent for the Magistrate to place on record what transpired in Chambers in so far as it relates to the decision he would take. The attendees to that meeting should have been divulged in the record. What then led to the second decision was not placed on record. The error the Magistrate is referring to in the record is not explained and its genesis and how it occurred is unknown. This is not a trivial matter because that has a bearing on whether or not the proceedings were in accordance with justice.

Conclusion

[17] It is a gross irregularity for a Magistrate to take two inconsistent and conflicting decisions at the same time and in one case. It is a fundamental principle of our law that a court order must be formulated in a language that leaves no doubt as to what the order requires to be done. Not only must the order be couched in clear terms, but its purpose must also be readily ascertainable from the language used¹⁸. The general principle is that once a court has duly pronounced a final judgment or order, it has no authority to correct, alter or supplement it. The reason is that it thereupon

¹⁷ Rule 66 of the Magistrates Court Rules

¹⁸ *Eke v Parsons* 2016 (3) SA 37 (CC) at 58F.

becomes *functus officio*: Its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased¹⁹. The principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (It is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end²⁰. The Magistrate had no jurisdiction, power or competence to grant the second order or decision²¹.

[18] It goes without saying that the first order was incompetent to be granted in the context of an application in terms of section 174 of CPA. The granting of the first decision or order was inimical to the Rules of natural justice, *to wit*, *audi alterum partem* rule, hence it constituted gross irregularity. It was granted without the accused being given an opportunity to state his case or his side of the story. The proceedings were manifestly not in accordance with justice.

[19] In *S v Rall*²² Trollip JA aptly stated thus:

“The judge must ensure that justice is done. It is equally important; I think that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.”

A criminal trial that proceeds and comes to a conclusion that the accused is guilty of an offence as charged and supports that with pieces of evidence, and immediately thereafter makes a different decision finding the accused not guilty without any meaningful reasons is manifestly not in

¹⁹ *West Rand Estates Ltd v New Zealand Insurance CI Ltd* 1926 AD 173 at 176, 178, 186 and 187.

²⁰ *Zondi v MEC, Traditional and local Government Affairs* 2006 (3) SA 1 (CC) Para 28.

²¹ Section 22(1)(a) of the Superior Courts Act 10 of 2013.

²² *Sv Rall* 1982 (1) SA 828 (A) at 831H- 832A.

accordance with justice. That kind of approach does not reflect that justice is done and that its seen to be done, hence the complainant herein complained. A decision taken by whom is unjust and cannot be in accordance with justice

[20] Our criminal procedure in general requires that a (i) manifestly (ii) impartial judicial officer (iii) in accordance with the prescribed procedural rules (iv) provide the litigants with fair opportunity to (v) conduct their respective cases in a meaningful manner by the presentation of (vi) admissible evidence (in chief or cross examination, or by means of exhibits), as well as by means of (viii) argument and then (viii) by using such evidence exclusively (ix) to give a clearly reasoned judgment. Any material departure which prejudices the accused causes a failure of justice which can be set aside²³. The procedural rules²⁴ were clearly flouted in this case. In discharging the accused in the context of section 174, on the bases that the accused was (which is not a reason under section 174) out on warning was manifestly not in accordance with the admissible rules and procedures and does not conduce to a reasoned judgment. The proceedings were manifestly not in accordance with justice.

Remedy

[21] A appropriate remedy in the circumstances of this case would be to review and set aside proceedings and the two orders or decisions made by the Magistrate on 14th March 2025 and further remit the matter for it to start *de novo* before another or different Magistrate.

²³ Himstrar's Criminal Procedure: Page 30-11.

²⁴ Section 174 of CPA .

[22] Mr Njoza is said to be an Acting Magistrate or was an Acting Magistrate at the time of the decisions. It is not clear if his contract has not come to an end. That is plain from the first sentence of the referral letter by the Acting Senior Magistrate, S Mokotjo, date 31st October 2025, wording of which is as follows:

“The matter appeared before Mr Njoza, the Acting Magistrate for trial.

.....

7. I am persuaded that the matter ought to have been referred by the Magistrate concerned for special review.

8.... upon perusal of the transcribed record indeed it is clear that the Presiding Judicial officer overturned his decision meaning that he reviewed himself after having committed a gross irregularity.”

This underscores the fact that this matter must be remitted before another Magistrate to start *de novo*. The Presiding Magistrate had prematurely held two conflicting positions in this matter. It is therefore in the interest of justice that these proceedings start *de novo* before another Magistrate.

Order

[23] In the result the following order is made:

23.1 The proceedings together with court order or decision granted on 14th March 2025 by the Magistrate’s court in the District of Bizana under Case Number B292/2023, finding the accused guilty (convicting) is hereby reviewed and set aside.

23.2 The proceedings together with court order or decision granted on 14th March 2025 by the Magistrate’s court in the District of Bizana under Case Number B292/2023 finding the accused not guilty (discharged or acquitting) is hereby reviewed and set aside.

23.3 This matter is remitted back to the Magistrates Court in the District of Bizana to start de novo before another Magistrate.

A.S ZONO
JUDGE OF THE HIGH COURT (ACTING)

I agree

B. MAJIKI
JUDGE OF THE HIGH COURT

Delivered on :13 January 2026