

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: REV 191/2024

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE 06 March 2026	
SIGNATURE.....	

In the matter between:

FRANK LESIBA GWANGWA

APPLICANT

-and-

**REGIONAL MAGISTRATE OF SESHEGO
MS SWANEPOEL**

1ST RESPONDENT

**DIRECTOR OF PUBLIC PROSECUTION
LIMPOPO**

2ND RESPONDENT

Delivered

: 06 March 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **06 March 2026 at 10:00 am**.

Date heard : 27th of February 2026

Coram : Naudé-Odendaal J and Chidi AJ

JUDGMENT – REVIEW JUDGMENT

Chidi AJ

INTRODUCTION:

- [1] This is an application to review the criminal proceedings, which led to a conviction and sentence by the Honourable Magistrate Ms Swanepoel. The conviction and sentencing were handed down on the 17th of January 2024 and 18th of March 2024, respectively, in the Regional Court, Seshego. The relief sought by the applicant, who approached the Court in terms of Rule 53 of the Uniform Court Rules, is on the ground of irregularity in terms of section 22(1)(c) of the Superior Courts Act 10 of 2013 (Act 10 of 2023).¹
- [2] The applicant before Court, Mr Gwangwa, a male person, was charged with murder of a deceased person. On 24th of November 2024, the applicant pleaded not guilty to the charge. He made a plea explanation, the essence of which was that he was not able to follow the proceedings.
- [3] Following the conclusion of the trial, the applicant was found guilty and sentenced to eight (8) years imprisonment. He was 75 years old when he was sentenced. Due to the late filing of the review application, the applicant applied for condonation for late filing. The accused, at the age of 75, was a breadwinner. He operated scholar transport business. After sentencing, he was and remains incarcerated. His funds ran dry. Only after about 8 months was the family able to secure different attorneys. As will appear below, the interests of justice enjoin the Court to grant condonation, as we do.

ISSUES FOR DETERMINATION

- [4] The Court was called to determine whether:
- 4.1. there ought to have been a determination regarding an inquiry into the reason of mental illness or intellectual disability of the applicant, causing him not to be capable of understanding the proceedings and a determination of a need for a report to be placed before the trial Court, following the enquiry, and
 - 4.2. if a determination ought to have been made and a report directed to be placed before the trial court, whether the proceedings, conviction and sentencing before and by the trial Court should be set aside and whether the matter should be remitted to the trial court, for the trial to be held *de novo*, before a different Magistrate.

TRIAL COURT

¹ Section 22(1)- The grounds upon which the proceedings of any Magistrate's 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 officer; (c) gross irregularity; and (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- [5] Before the trial court, the applicant, an accused then, appeared before the learned Magistrate, Ms Swanepoel. The applicant stated during various stages of the proceedings that he suffered from memory loss. He stated as his reasons for the loss, old age and the lapse of time between the date of the incident and the commencement of the trial. He could not, as he stated and his legal representative recorded, clearly remember the incident for which he was charged.
- [6] The applicant's legal representative was Mr Ramokgopa. When the trial commenced, Mr Ramokgopa informed the trial court of his difficulty in consulting with the applicant. He went further and stated that the applicant "cannot clearly recall the incident". The applicant's memory sometimes fails him, Mr Ramokgopa further stated. This was confirmed by the accused² at the plea explanation stage.
- [7] After the applicant's confirmation, the learned Magistrate turned to the competent verdicts to the charge of murder in the circumstances of the matter. She recorded what those are.³ When the applicant's time to testify came, the same concern memory loss became the basis for postponement.⁴ The defence was to decide what should happen and inform the trial court what its decision was when the matter would resume. The matter resumed on the 1st of December 2022. On the date, the accused was called to the witness box. The essence of his testimony was that he had memory lapses.⁵
- [8] That the trial Court understood the applicant's point is clear from the record. When overruling the Prosecutor, Ms Thabudi, concerning the manner in which she put a specific question to the accused, the Court recorded:
- "I can refer to the plea explanation where it was said he cannot clearly recall the incident. His memory fails him. He is not clear on his memory on the incident specifically."⁶
- [9] It may be doubtful whether the applicant was not able to follow the proceedings. This appears from a pre-sentencing report compiled in respect of the applicant, by the Probation Officer, Ms Masoga. It is recorded in paragraph 11 of the report that:
- "the accused informed the Probation Officer that he is able to think properly and he is able to give reasons for his actions and thoughts".
- [10] Further, the applicant informed the Probation Officer where the incident took place, and that the deceased started the fight with him.⁷

² Record- volume 3 paginated bundle, pages 6-7.

³ *Ibid*, pg 7.

⁴ *Ibid*, pgs 18-19.

⁵ *Ibid*, pgs 69, 71 and 74.

⁶ *Ibid*, pg 83.

⁷ Volume, pg 308 (para 15.1).

- [11] A reading of the founding affidavit filed in this review application may be the basis for further doubt whether the accused suffers from loss of memory. The applicant deposed to the said affidavit. He declared to the commissioner of oaths that he knows and understands the contents of his affidavit. The applicant may have been assisted, it appears, by legal representatives to settle the said affidavit. However, it is him who declared his knowledge and understanding of the contents of the affidavit. Four pages of his affidavit are dedicated to several instances during the trial when the Court was notified of his loss of memory and the accompanying challenges.
- [12] The submissions demonstrate that the applicant recalls what took place during the trial. It may as well be, as Mr Ramokgopa stated, without concluding, that the gap between the incident for which the applicant was charged and the commencement of the trial was a long time, that is from the year 2020 to November 2023, taking into account the fact that the sentencing and the review application were during the same year, to wit 2024, this being a short period, it appears.

THE LAW

- [13] Central to the issue for determination is section 77 (1) of the Criminal Procedure Act, 51 of 1977, as amended (the CPA). The section provides that-
- 'if it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'
- [14] At any stage during criminal proceedings, if there appears to be a reasonable possibility that the accused is not able to follow the proceedings or might lack criminal responsibility, the Court should order an enquiry. A turn to a judgment of the Supreme Court of Appeal (SCA) is apposite. Interpreting the section, in **Chauke v The State**, 2016 (1) SACR 408 (SCA), at para 10, the SCA held-
- 'A court must be satisfied that a sufficient basis has been laid for the allegation of mental illness before it can direct that an enquiry be held under s 79. The person requesting referral for observation is required to lay a basis for such a request. The standard of the test for referral is low, mainly because the issue is important and a . . . judge or magistrate . . . is a lay person in the field of psychiatry and psychology.' In *S v Tom* it was decided that once there is a reasonable possibility that the accused is not able to follow the proceedings or might not have been criminally responsible for her actions, the court is obliged to direct that an enquiry under ss 77 or 78 and 79 is conducted.' Footnotes excluded.
- [15] To be grossly irregular, the manner of conduct of proceedings should be of so gross a nature that it was calculated to prejudice the aggrieved litigant. An example of conduct

justifying a review based on a gross irregularity in the proceedings is where a judicial officer acts in a high-handed manner and prevents a party from having its case heard.⁸

[16] The higher Courts have the authority to supervise the manner in which Magistrates discharge their judicial functions. These are objective controls that are relevant to the institutional independence of the lower courts.⁹

ANALYSIS

[17] The probation officer's report and the founding affidavit in these proceedings did not serve before the trial court prior to the conviction. Although before sentencing the trial court had the benefit of the Probation Officer's report, the court did not have serving before it the founding affidavit in this matter.

[18] During the trial, the applicant and his legal representative brought to the attention of the trial court the applicant's memory challenges. Section 77 (1) (a) of the CPA enjoins a trial Court to consider whether an enquiry to determine the accused's capabilities to follow the proceedings should be held, and if so, that a report to that effect be placed before it. Once there is a reasonable possibility, not as a fact, that the accused is not able to follow the proceedings before the trial Court, a determination as to whether an accused is able to follow the proceedings ought to be made.

[19] The record does not show that the Learned Magistrate made a determination whether the applicant was able to follow the proceedings or not. The non-determination-

19.1. may prevented the applicant from having his case heard.¹⁰ It is possible that the determination may have led to an enquiry, which in turn may have led to the proceedings being conducted as per the outcomes of the enquiry, and

19.2. vitiates the proceedings, the conviction and sentencing.

[20] This Court, limited to the record, does not express itself whether or not there ought to have been an order for an enquiry in terms of section 77 (1) (a) of the CPA. It is a trier of facts who should make that determination. Even if it appears to be doubtful, if there is a possibility of an accused sometimes losing his/her memory, the trier of fact, guided by the law, would make an appropriate decision on determination.

⁸ *ABSA Bank Ltd v De Villiers and Another*, [2010] 2 All SA 99 (SCA), para [26], footnotes omitted. Although the comment related to civil proceedings, the same, in my view, applies to criminal proceedings.

⁹ *Van Rooyen and Others v The State and Others* 2002 (5) SA 246, pg 270 (E-F).

¹⁰ See para 15, above.

CONCLUSION

[21] The trial court ought not to have proceeded without the section 77 (1) (a) of the CPA determination, upon the learned court being notified of, not only the applicant's challenges but also of Mr Ramokgopa's impediments he recorded to have had in consulting with the accused. Mr Ramokgopa did not say that it was impossible to consult with the applicant, but that it was difficult. Sometimes, the applicant losing his memory, as he recorded. The learned magistrate's awareness she recorded in paragraph 8, above, should have caused her to make a determination.

[22] It was procedurally grossly irregular of the trial court to proceed as it did.

ORDER:

[23] It is hereby ordered that—

1. The review is upheld;
2. The proceedings, conviction and sentence under case number RCS 63/2022, Regional Court Seshego are set aside, and
3. The matter is remitted back to the trial court for the trial to start *de novo* before a different magistrate.


M CHIDI AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

 I agree


NAUDÉ-ODENDAAL J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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APPEARANCES:

FOR THE APPLICANT

INSTRUCTED BY

FOR THE RESPONDENT
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