

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **A732/2016**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<u>10/06/2016</u> <u>[REDACTED]</u> DATE SIGNATURE	

In the matter between:

PATRICK SITHOLE

First Appellant

ALFRED OUPA SEUNTJIE MTHINMUNYE

Second Appellant

PIET DOSKI MUDAU

Third Appellant

BONGANI INNOCENT MANDLAZI

Fourth Appellant

and

THE STATE

Respondent

EX-TEMPORE JUDGMENT

MBONGWE, J: **[MATLAPENG, AJ CONCURRING]**

INTRODUCTION

- [1] We have considered the submissions by both counsel for the Appellant and for the Respondent.
- [2] What stands out and is common cause is that since the launching of appeal against the conviction and sentence, a period of approximately 11 years has elapsed as a result of the record of the proceedings in the court a quo not being capable of the necessary reconstruction due, *inter alia*, the difficulty of locating the trial Magistrate who has since retired. It is not known exactly when the trial Magistrate retired and why the reconstruction of the record could not be done and completed before his retirement.
- [3] The Court appreciates the submission by counsel for the State that the matter be struck from the roll. However, counsel could not persuade the Court by proffering a plausible reason against the setting aside of the conviction and sentence in view of the circumstances already alluded to precluding the hearing of the appeal and finalisation of the matter. Nor could the State present any new facts that suggest that the record will now be reconstructed should the matter be struck from the roll and reinstated in the near future.
- [4] It is an important principle of our law that finality be brought in any litigious matter, more so where the freedom of the person serving a sentence remains infringed and his constitutional right to liberty as enshrined in the Constitution infringed.
- [5] This Court has had regard to the matter of *S v Motloutsi*¹ where, in reaching the orders made, the Supreme Court of Appeal ("SCA") stated that:

"The State must ensure proper records. If they cannot, accused must get the benefit."

- [6] We consequently make the following orders:

¹ 1996 (1) SACR58 (A).

1. It is apparent that the record of the proceedings in the court a quo cannot be reconstructed;
2. This Court is unable and has not been able to consider the merits of the appeal (since 2026) as required by Section 309 of the Criminal Procedure Act;²
3. The right to appeal forms part of the right to a fair trial in terms of Section 33 (3) of the Constitution;³
4. In *S v Steyn*,⁴ the SCA held that where the record is lost and cannot be reconstructed, the conviction and sentence must be set aside, unless a retrial *de novo* is appropriate. Our view, the Appellant has already served a very long period of imprisonment and to subject him to a retrial, would be to double prejudice.
5. Order, the conviction and sentence are set aside. The Accused should be released forthwith.


 JUDGE MPN MBONGWE
 JUDGE OF THE HIGH COURT
 GAUTENG DIVISION
 PRETORIA

I AGREE;


 ACTING JUDGE MATLAPENG
 JUDGE OF THE HIGH COURT
 GAUTENG DIVISION
 PRETORIA

² Act No. 51 of 1977.

³ Act No. 108 of 1996.

⁴ [2009] ZASCA 152.

APPEARANCES:

For Appellant:

MB KGAGARA

Instructed by:

Legal Aid South Africa

For the Respondent:

M SHIVURI

Instructed by:

The State

Date of Hearing:**10 June 2026****Date of Ex-Tempore Judgement:****10 June 2026**

THIS JUDGEMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 10 JUNE 2026