



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Review Case No: HC22/2026

Magistrate's Serial No: 01/2026

Lichtenburg Case No: A21/2026

In re:

THE STATE

and

SIMON MMOTE TWAI

CORAM: PETERSEN J, et REDDY J

REVIEW LAID BEFORE PETERSEN J: 28 July 2026

DELIVERED: 03 August 2026

Summary: Automatic review – Magistrate presided at the accused’s first appearance, at which the accused disclosed previous convictions in terms of section 60(11B) of the Criminal Procedure Act 51 of 1977 – The same magistrate thereafter took the accused’s plea of guilty, convicted and sentenced him – On the authority of *Nkuna v S*, *S v Booysen* and *S v S M N*, the magistrate’s prior knowledge of the accused’s previous convictions constituted an irregularity vitiating the proceedings, irrespective of the magistrate’s candid averment that she had no independent recollection of the disclosure – Conviction and sentence set aside – Further held that, although the accused’s

legal representation ordinarily would have excluded the matter from automatic review under section 302(3), the irregularity having been brought to the attention of this Court, it falls to be dealt with under section 304(4) of the Act.

REVIEW JUDGMENT

PETERSEN J:

Introduction

[1] This matter serves before this Court on review. The accused, Mr Simon Mmote Twai, was convicted in the Lichtenburg Magistrate's Court on a charge of theft and sentenced to twelve months' direct imprisonment.

[2] The review raised a single, decisive issue. Whether the proceedings were vitiated by the fact that the magistrate who convicted and sentenced the accused had, at an earlier appearance, personally received the accused's disclosure of his previous convictions. A related, subsidiary issue arose as to the basis upon which the matter was directed for automatic review at all, given that the accused appears to have been legally represented.

[3] Before finalising the review, this Court addressed a query to the magistrate, Ms C Wessels, in terms of s 304(2) of the Criminal Procedure Act 51 of 1977 ("the CPA"), inviting her comment on both issues. Her response has now been received and considered. The query and the response are set out in full below.

Background

[4] The accused first appeared in the Lichtenburg Magistrate's Court on 12 February 2026 on a charge of theft, it being alleged that on 10 February 2026 he stole multiple pairs of socks to the value of R239,96 from a store in Lichtenburg Mall.

[5] At that first appearance, the presiding magistrate, Ms Wessels, administered the statutory warning in terms of s 60(11B) of the CPA. In response, the accused disclosed that he had previous convictions, including five previous convictions of theft.

[6] The record reflects that Ms Wessels presided at every subsequent appearance in the matter. On 30 March 2026 she took the accused's plea of guilty to the charge of theft and convicted him. On 3 June 2026 she sentenced him to twelve months' direct imprisonment. It is common cause on the record that no other judicial officer presided at any stage of the proceedings.

[7] The accused, for purposes of tendering his plea of guilty pursuant to s112(1)(b) of the CPA and the ensuing sentencing proceedings was legally represented a Ms Medupe.

The applicable principles

[8] It is well established that ss 89, 197, 211 and 271 of the CPA are all directed against the disclosure of previous convictions at any stage before the conviction of an accused person. Where a judicial officer acquires knowledge of an accused's previous convictions before conviction, and thereafter proceeds to convict the accused, an irregularity arises which, in the ordinary course, nullifies the proceedings as a whole¹.

[9] In *Nkuna*, the magistrate's knowledge of the appellant's previous convictions was obtained during a bail application over which the same magistrate presided. That knowledge, obtained before conviction, was held to constitute an irregularity nullifying the subsequent trial notwithstanding that the appellant had pleaded guilty and that the evidence against him was cogent.²

[10] This Division has applied the same principle on materially indistinguishable facts. In *S v S M N*, the magistrate's prior knowledge of the accused's previous conviction and a pending matter, obtained before conviction,

¹*Nkuna v S* (A62/2012) [2013] ZAGPPHC 111; 2013 (2) SACR 541 (GNP) para 5.

²*Nkuna v S*, above, paras 3 and 10.

was held to have created a reasonable apprehension on the part of the accused that the magistrate would not be impartial. It was not necessary to show that the magistrate was in fact biased. The reasonable apprehension of bias, without more, rendered the proceedings a nullity³.

[11] The Eastern Cape Division has engaged the contrary view, sometimes advanced or postulated, that presiding officers can simply be trusted to disabuse their minds of prejudicial information obtained at an earlier stage of the same proceedings. In *S v Booysen* the court declined to follow *S v Thusi and Others* and *S v Hlati*, both of which had held that a magistrate's prior knowledge of an accused's previous convictions, disclosed under s 60(11B), did not vitiate a subsequent conviction unless actual bias was shown. The court aligned itself instead with *S v Bruinders* and *Nkuna v S*, holding that where a bail application involving formal consideration of the factors in s 60 of the CPA has been heard, the presiding officer will ordinarily be disqualified from presiding at the accused's subsequent trial, subject only to narrow exceptions⁴.

[12] The rationale underlying this line of authority is one of principle rather than outcome. The prejudice lies in the taint to the fairness of the process itself, once a judicial officer's mind has been exposed to an accused's criminal history before guilt has been determined. The enquiry is objective. It does not turn on whether the presiding officer subjectively recalls or was consciously alive to the disclosure at the moment of conviction. It turns on whether a reasonable, objective and informed observer, aware that the disclosure was made to the same officer who thereafter convicted the accused, would apprehend a risk to impartiality. A guilty plea does not cure that irregularity, since the concern is not whether the correct result was in fact reached, but whether justice was seen to be done.

The query to the magistrate and her response

³*S v S M N* (HC28/2025) [2025] ZANWHC 178 (28 August 2025) paras 8–9.

⁴*S v Booysen* 2016 (1) SACR 521 (ECG) para 25; see also paras 20–24, declining to follow *S v Thusi and Others* 2001 (2) SACR 353 (N) and *S v Hlati* 2000 (2) SACR 325 (N).

[13] The query addressed to the magistrate, dated 28 July 2026, read as follows:

‘QUERY TO THE MAGISTRATE IN TERMS OF SECTION 304(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

To: The Magistrate, Ms N. Wessels, Lichtenburg Magistrate's Court (per the Clerk of the Court, Lichtenburg)

1. This matter serves before me on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 ("the CPA"). Before finalising the review, I consider it necessary to obtain your comments on the two matters set out below.

The disclosure of previous convictions

2. The record reflects that on 12 February 2026, at the accused's first appearance, you personally presided and administered the warning in terms of section 60(11B) of the CPA, in the course of which the accused disclosed that he had previous convictions, including five previous convictions of theft.

3. The record further reflects that you presided at each subsequent remand, that you took the accused's plea of guilty on 30 March 2026, convicted him, and thereafter sentenced him to twelve months' direct imprisonment on 3 June 2026.

4. It therefore appears from the record that you had knowledge of the accused's previous convictions, obtained in the course of the section 60(11B) disclosure, before you convicted him. On the authority of *Nkuna v S* (A62/2012) [2013] ZAGPPHC 111; 2013 (2) SACR 541 (GNP), *S v Booysen* 2016 (1) SACR 521 (ECG) and *S v S M N* (HC28/2025) [2025] ZANWHC 178 (28 August 2025), such prior knowledge, on the part of a judicial officer who thereafter presides at the trial and convicts the accused, ordinarily constitutes an irregularity vitiating the proceedings, regardless of whether the accused pleaded guilty and irrespective of actual bias. In *Booyesen*, the Eastern Cape Division held that a presiding officer who has heard a bail application involving formal consideration of the section 60 factors is ordinarily disqualified from presiding at the accused's subsequent trial, subject only to narrow exceptions.

5. You are accordingly requested to comment on:

5.1 whether you were, at the time you took the plea and convicted the accused, aware that the accused had disclosed previous convictions before you at the appearance of 12 February 2026;

5.2 whether there is any reason, in your respectful view, why the principles in *Nkuna v S*, *S v Booysen* and *S v S M N* should not apply to the proceedings in this matter; and

5.3 whether, in your respectful view, this matter falls within any of the narrow exceptions to the ordinary rule of disqualification recognised in *Booyesen*.

The basis for automatic review

6. The record reflects that the accused was legally represented at the proceedings (a legal representative of record is noted as having addressed the accused's guilty plea, and Ms Modupe appears on record for the accused at the later hearings). Section 302(3) of the CPA ordinarily excludes a case from automatic review where the accused was legally represented at trial.

7. You are requested to comment on the basis upon which the matter was nonetheless directed for automatic review, and in particular whether the accused's legal representative was privately instructed or appointed by Legal Aid South Africa.

8. Your comments are requested by no later than 31 July 2026 at 10h00, addressed to the Registrar of this Division for my attention, with reference to the above review number.'

[14] The magistrate responded as follows, in a statement dated 30 July 2026:

'RESPONSE TO THE REVIEW QUERY

I, the undersigned, C. Wessels, Magistrate of the District Court for the District of Ditsobotla, Lichtenburg, respectfully respond to the Honourable Judge's query as follows:

Ad paragraph 5.1

I confirm that I presided over the accused's first appearance on 12 February 2026, during which the warning contemplated in section 60(11B) of the Criminal Procedure Act 51 of 1977 was administered.

However, I have no independent recollection that the accused disclosed previous convictions during those proceedings. At the time I accepted the accused's plea, convicted him and later imposed sentence, I was not

consciously aware that such disclosure had previously been made before me. My attention was drawn to this only upon receipt of the review query and after reconsidering the record.

Ad paragraphs 5.2 and 5.3

Having considered the authorities referred to by the Honourable Judge, namely *Nkuna v S*, *S v Booysen* and *S v S M N*, I am unable to advance any legal basis upon which those principles should not apply to the present matter.

I am likewise unable to identify any of the recognised narrow exceptions to the ordinary rule of disqualification discussed in *S v Booysen*.

If my prior involvement in the section 60(11B) proceedings rendered me disqualified from presiding at the subsequent trial, I respectfully accept that this constituted an irregularity. I regret this oversight and assure the Court that I shall ensure that this issue receives careful attention in future proceedings.

Ad paragraphs 6 and 7

The matter was forwarded on automatic review because I have less than five years' experience as a magistrate and the accused was sentenced to twelve months' direct imprisonment.

In forwarding the matter, I overlooked that the accused had been legally represented during the proceedings. If the record correctly reflects that the accused was legally represented throughout the trial, I accept that section 302(3) of the Criminal Procedure Act would ordinarily exclude the matter from automatic review.

The court file should, however, reflect the basis upon which the legal representative appeared for the accused.

I respectfully submit these comments for the consideration of the Honourable Court.'

Application to the facts

[15] On the facts of the present matter, the position is on all fours with *Nkuna*, *Booyesen* and *S v S M N*. Ms Wessels received the accused's disclosure of his previous convictions, in terms of s 60(11B), at the first appearance on 12 February 2026. She thereafter personally took the accused's plea, convicted him, and sentenced him.

[16] The magistrate's candid response confirms that she presided at the s60(11B) proceedings and does not dispute that the disclosure was in fact made. She states only that she had no independent recollection of it and was not consciously aware of it when she convicted and sentenced the accused.

[17] That averment, though made with commendable candour, does not assist in resisting the conclusion that the proceedings were irregular. As explained above, the test is objective and does not depend on the presiding officer's subjective recollection. It is precisely the argument that a judicial officer can be trusted to have set prejudicial information aside, whether consciously or through the ordinary fading of memory, that *Booyesen* rejected in declining to follow *Hlati*. The magistrate's own inability, on reflection, to identify any basis for distinguishing *Nkuna*, *Booyesen* and *S v S M N*, or to bring the matter within any of the narrow exceptions recognised in *Booyesen*, confirms rather than displaces this conclusion.

[18] It follows that the proceedings before the magistrate were vitiated by an irregularity of the kind identified in *Nkuna*, *Booyesen* and *S v S M N*, and that the conviction and sentence cannot stand.

The basis for automatic review

[19] The magistrate has confirmed that the matter was directed for automatic review on the basis that she had, at the relevant time, less than seven years' service as a magistrate and had imposed a sentence of imprisonment exceeding the threshold prescribed in s 302(1)(a) of the CPA, and that she overlooked, in doing so, that the accused had been legally represented.

[20] The magistrate is correct that, ordinarily, s 302(3) of the CPA excludes from automatic review a case in which the accused was legally represented at trial. That does not, however, deprive this Court of the power to deal with the proceedings. Section 304(4) of the CPA provides that where it is brought to the notice of a judge that proceedings in a matter not subject to review in the ordinary course were not in accordance with justice, that judge has the same

powers in respect of the proceedings as if the record had been laid before the court in terms of section 303 or section 304⁵. The irregularity dealt with in this judgment having been brought to this Court's attention, albeit inadvertently in error by the magistrate, and this Court being satisfied that the proceedings were, for the reasons given above, not in accordance with justice, the matter falls to be, and has been, dealt with accordingly, irrespective of whether s 302 was strictly applicable.

Conclusion

[21] For the reasons set out above, the conviction and sentence cannot stand. The matter accordingly stands to be remitted for trial *de novo*.

Order

In the result, the following order is made:

1. The conviction and sentence imposed on the accused, Mr Simon Mmote Twai, in the Lichtenburg Magistrate's Court under case number A21/2026, are reviewed and set aside.
2. The matter is not remitted for trial *de novo*.
3. If the accused is in custody or otherwise, pursuant to the conviction and sentence set aside in paragraph 1, the Clerk of the Court, Lichtenburg, in consultation with the Senior Public Prosecutor, is directed to take the steps, necessary to secure the attendance of the accused before a magistrate, other than Ms Wessels and to report to the Registrar of this Honourable Court when the accused has appeared before court.
4. In the event of a conviction at the hearing *de novo*, the time spent in custody, and this judgment must be brought to the attention of the presiding magistrate to factor same into any sentence imposed by that court.
4. The Registrar is directed to transmit a copy of this judgment to the magistrate, Ms C Wessels, and the Chief Magistrate, Ms JJ Ikaneng for their information.

⁵Section 304(4) of the Criminal Procedure Act 51 of 1977.

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

A REDDY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG