

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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|-----|----------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: **4th November 2021** Signature: _____

CASE NO: 23684/2021

DATE: 4th November 2021

In the matter between:

MILNER (previously HERSELMAN, born METZ), NILA MARTINE Applicant

and

**THE MINISTER OF JUSTICE &
CONSTITUTIONAL DEVELOPMENT**

First Respondent

THE MINISTER OF POLICE

Second Respondent

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICES**

Third Respondent

**THE DIRECTOR-GENERAL OF THE DEPARTMENT OF
JUSTICE & CONSTITUTIONAL DEVELOPMENT**

Fourth Respondent

Heard: 21 October 2021 – The ‘virtual hearing’ of this unopposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 4 November 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 4 November 2021.

Summary: Criminal law – Admission of guilt – setting aside of – admission of guilt fine paid by accused because she did not want to be detained – application for review and setting aside of admission of guilt brought as a Civil Court application – incorrect procedure – review in terms of s 304(4) of the Criminal Procedure Act appropriate way to bring review of proceedings.

ORDER

- (1) The applicant's application is removed from the roll.
- (2) The applicant is directed to refer her application to the Clerk of the Randburg Magistrates Court with a request that the case be referred to this Court for a special review in terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977.
- (3) The Clerk of the Randburg Magistrates Court is directed to forward to the Registrar of this Court the record of the proceedings in the case of *State v Nila Metz*, case no A/G W7304737 – Trespassing (3 September 2012), or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer or the Senior Magistrate (Randburg) may wish to append thereto.
- (4) The Registrar of this Court shall, as soon as possible, lay the said record in chambers before a Judge of this Division for her or his consideration in terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977.
- (5) The applicant shall bring this judgment and the order to the attention of the Senior Magistrate and the Chief Magistrate of the Randburg Magistrates Court.
- (6) The applicant shall ensure that this judgment and the order are served on the Office of the National Prosecuting Authority in Johannesburg and the Director of Public Prosecutions, Johannesburg, who are hereby invited in terms of s 304(3) of the CPA to argue such questions of law or of fact arising in this case

(7) There shall be no order as to costs.

JUDGMENT

Adams J:

[1]. This matter came before me in the Unopposed Motion Court on Thursday, 21 October 2021. The applicant, who was convicted during 2012 on a charge of trespassing, applies for an order reviewing and setting aside the said conviction, which evidently was in terms of section 57(6) of the Criminal Procedure Act, Act 51 of 1977 ('the CPA') and based on an admission of guilt by the applicant. The applicant also paid an admission of guilt fine of R300.

[2]. The application was served on all of the respondents, being the Minister of Justice and Constitutional Development, the Minister of Police, the National Director of the South African Police Services and the Director-General of the Department of Justice and Constitutional Development, who have all indicated that they would abide the decision of the Court relating to the applicant's application. It may be apt to recite in full the relief sought by the applicant in her notice of motion, which prays for orders in the following terms:

- (1) That the conviction of the applicant in terms of Section 57(6) of the Criminal Procedure Act, Act 51 of 1977, whereby the applicant paid an admission of guilt to a charge of trespassing on 1 September 2012, be reviewed and set aside;
- (2) Directing the Director General of Justice and Constitutional Development to instruct the Head of the Criminal Record Centre of the South African Police Services to remove and/or expunge the criminal record of the applicant within 14 days from date of this Order being granted;
- (3) Alternatively to clause (2) above, and only in the event that the Director General of Justice and Constitutional Development does not instruct the Head of the Criminal Record Centre of the South African Police Services in terms of clause (2) above, then directing the National Police Commissioner

to remove and/or expunge the criminal record of the applicant within 14 days from the date of this Order being granted.

- (4) Repayment of the Admission of Guilt fine of R300 to the applicant.
- (5) Cost of suit in the event of opposition.

[3]. In a nutshell, the case of the applicant is that on 1 September 2012 she was arrested by the SAPS whilst on the premises of Monte Casino in Fourways. She was arrested on suspicion of trespassing as she was prohibited from visiting the Casino or any other gambling institutions. She was thereafter taken to the Douglasdale Police Station, where she was made to believe that the police officers, who arrested her, were simply 'following procedures' and processing her, whilst in truth, so she avers, she was in effect being tricked into admitting guilt and paying an Admission of Guilt fine. She only found this out during 2019, when she made enquiries with the Office of the National Commissioner of the South African Police Services, who advised her on 2 April 2019 that, under Randburg Case no A/G W7304737, she had in fact been convicted on 3 September 2012 on a charge of 'Trespassing in Public Building or on Public Transport'.

[4]. This is how she explains the incident in her founding affidavit:

- '21 After [the arresting officer] had completed the form, he also asked if he could take my finger prints and photos. I was extremely nervous at this point and asked him why he needed to take my finger prints and photos. He did not reply and I decided not to press the matter any further as I was extremely concerned that I was going to be detained. I decided to cooperate as far as I possibly could in order not to cause any further issue on the matter.
- 22 The policeman then advised me that it was a simple process and that if I paid R300 I could go home and I would not have to sleep in the cells until Monday morning. I had no idea what the R300 was for. I asked to speak to my lawyer and told them that I had done nothing wrong. The policeman kept on saying "this is procedure" and he promised me that I was not being arrested and charged and if I paid the R300 then I could just leave and go home.
- 23 At no stage was I told that I was signing and paying an admission of guilt fine.
- 24 I was anxious at the time of being at the police station and I was not fully concentrating on what was going on.

25 I agreed to pay the R300 as I did not want the matter to continue and I just wanted to get out of the police station as I was anxious and very concerned that I would be kept in custody until Monday morning. Once I paid the R300, the policeman did not even provide me with a receipt and simply told me to leave.'

[5]. The applicant therefore contends that the Court should review and set aside the proceedings in terms of which she was unknowingly convicted and sentenced. Her rights, so she states, were infringed in that the consequences of her paying the admission of guilt, were not explained to her. She also alleges that she has been severely prejudiced by the criminal record that is the result of this incident in that she is at present unable to proceed with adoption proceedings which has been commenced at her instance. The criminal record furthermore affects her ability to travel to certain countries without a police clearance.

[6]. During the hearing of the application, which, as already indicated, proceeded on an unopposed basis, I enquired from Mr Natha, who appeared on behalf of the applicant, as to the legal basis on which the relief sought by the applicant can and should be granted. I pointed out to him that, as a general rule, it would be undesirable for convictions to be set aside lightly albeit in respect of minor offences. Mr Natha made the submission that the interest of justice requires that the conviction be set aside in the circumstances of this matter. He could however not point to the procedure to be followed to achieve that objective.

[7]. Prior to launching this application, the applicant's attorney did however seek guidance on the procedure to be utilised with a view to obtaining the relief sought in this application. He was directed to move an application as was done by him *in casu*. Unfortunately, and regrettably, this was not the correct procedure to be followed.

[8]. The applicant's cause is based simply on the fact that she has suffered an injustice as a result of the proceedings in the Randburg Magistrates Court. There is nothing novel about such a cause of action, which falls squarely within the four corners of the provisions of section 304(4) of the CPA, which provides as follows: '(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or

local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.’

[9]. The approach to be adopted by the applicant is to have this case referred for a special review by this Court in terms of s 304(4) of the CPA. This principle has been established in a plethora of cases. I will refer to only one of the latest, that being *S v Madhinja*¹, in which Thulare AJ held that s 304(4) of the CPA was the appropriate way to bring a review of the proceedings where the magistrate had not set aside the conviction and sentence in terms of s 57(7).

[10]. Other cases which confirm that the s 304(4) special review procedure is to be followed to have set aside a s 57(6) conviction and sentence, are: *S v Houtzamer*²; *S v Parsons*³; *S v Tong*⁴; *S v Claasen*⁵; *S v Gilgannon*⁶; *S v Mutobvu*⁷ and *S v Mokwele*⁸. In all of these cases a similar approach was taken to that adopted by Thulare AJ in *Madhinja*.

[11]. Section 304(4) provides for a special or exceptional review process in the case of criminal matters concluded before the Magistrates Court. The section states that this court has the power to review the proceedings of a lower Court if it is brought to the attention of this court that the proceedings were not in accordance with justice.

[12]. This matter fits the mode. It cannot be gainsaid that it has now come to the attention of this Court that the proceedings in the Randburg Magistrates Court were not in accordance with justice. That fact came to my attention by virtue of this application which came before me in the unopposed motion court. This court

¹ *S v Madhinja* 2019 (1) SACR 297 (WCC).

² *S v Houtzamer* [2015] ZAWCHC 25.

³ *S v Parsons* 2013 (1) SACR 38 (WCC).

⁴ *S v Tong* 2013 (1) SACR 346 (WCC).

⁵ *S v Claasen* [2012] ZAFSHC 231.

⁶ *S v Gilgannon* [2013] ZAGPJHC 226

⁷ *S v Mutobvu* 2013 (2) SACR 366 (GNP)

⁸ *S v Mokwele* [2015] ZAGPPHC 14

therefore has the same powers to review the proceedings as per s 303 of the CPA. That procedure, which is very specific, is the procedure to be followed by the applicant in this matter and, in order to assist the applicant and with a view to ensuring that the administration of justice is served, I intend issuing orders to try and assist an expeditious finalisation of the matter. The application presently before me in the unopposed motion court, however, stands to be removed from the roll.

[13]. I reiterate that the proceedings in the Randburg Magistrates Court should be brought on special review before this Court in terms of s 304(4) of the CPA. It would therefore be necessary for the Randburg Magistrates Court to place before this Court, the record of the proceedings. Additionally, the provisions of s 304(2)(a) of the CPA prescribes a procedure which requires this court, when it believes that the proceedings in the Magistrates Court were not in accordance with justice, to obtain from the judicial officer who presided at the trial a statement setting forth her or his reasons for convicting the accused and for the sentence imposed.

[14]. S 304(3) of the CPA also requires that the National Prosecuting Authority, be required to make submissions in relation to questions of law or of fact arising in this case. A direction in that regard will therefore be issued.

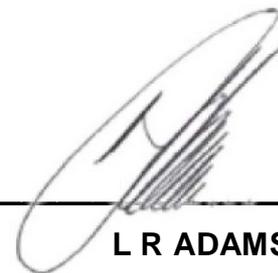
Order

Accordingly, I make the following order: -

- (1) The applicant's application is removed from the roll.
- (2) The applicant is directed to refer her application to the Clerk of the Randburg Magistrates Court with a request that the case be referred to this Court for a special review in terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977.
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presiding judicial officer or the Senior Magistrate (Randburg) may wish to append thereto.

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- (7) There shall be no order as to costs.



L R ADAMS

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON:	21 st October 2021 as a videoconference on <i>Microsoft Teams</i>
JUDGMENT DATE:	4 th November 2021
FOR THE APPLICANT:	Attorney Kamal Natha
INSTRUCTED BY:	Kamal Natha Attorney, Sandton
FOR THE RESPONDENTS:	No appearance
