A212/14

A...../Mm

THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

DATE: 28/3/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE 12/03/2014 SIGNATURE

Magistrate: Polokwane

Review Case no: Dc122/12

High Court Ref no: 1109

THE STATE V NARE BENJAMIN CHOKOE

REVIEW JUDGMENT

RAULINGA J,

[1] This matter was referred to me on review. The gist of this special review hinges on the destruction of case records, documents, books, registers and court files in a fire that engulfed the Polokwane Magistrate Court Building on the 19 October 2012. Among others was the court record in the instant case which perished in the said tragic fire incident.

[2] The Acting Court Manager of the court, under oath reports that the Digital Court Recording System (DCRS), which electronically captures and stores audio court proceedings data is backed up quarterly by the contractors, Dimension Data. That the last data backup was done on the 4 July 2012 and all the audio records from 4 July 2012 to 19 October 2012 perished in the fire with all the records. The records of proceedings in these matters cannot be reconstructed accurately. This information is confirmed by the presiding officer and the legal representative for the accused in

this case. In his affidavit the presiding officer states that he attempted to reconstruct the record with the defence attorney, and the state prosecutor, but to no avail. He is of the view that the proceedings be set aside.

[3] For purposes of an appeal or review or a continuation of the trial, an adequate record of the proceedings for such purposes is a prerequisite. The absence of such a record hampers a just hearing of the appeal or review thereby constituting a "technical irregularity or defect in the procedure" within the meaning of section 324 of the Criminal Procedure Act ("CPA")[1] read with section 313 thereof and renders the conviction and or sentence liable to be set aside.[2]

[4] In casu, the proceedings were still continuing - the court had not yet arrived at the stage of conviction and sentence. It is clear from the reading of sections 313 and 324 of the CPA[3] that both sections apply with reference to any conviction and sentence of a lower court that are set aside on appeal or review on any ground referred to in that section. The only ground which is closely relevant to the facts of this case is subsection 324(c)[4] – 'that there has been any other technical irregularity or defect in the procedure'. The only thing that one can borrow from this subsection is the phrase 'technical irregularity'.

[5] The term 'technical' was considered in S v Moodie[5] and was described as an irregularity which justifies the setting aside of a conviction by the court of appeal (in our case the review court) where it precludes a valid consideration of the merits, in other words, if it makes it impossible for the court to give a valid verdict on the merits and therefore no decision on a conviction or an acquittal – a retrial is possible under section 324 – S v Naidoo.[6]

[6] The legal issue to be answered here is whether a magistrate can apply to the high court for a special review of a continuing case, where some of the records go missing

---

[1] 51 of 1977
[2] As regards appeals S v Marais 1966(2) SA 514(T) 516 H; S v Joubert 1991(1) SA 119(A) 126F –J; S v Whitney & Another 1975 (3) SA 453(N) 456F –G; S v Qualu 1989 (2) SA 581(ECD) 583 F-G, 584 AB.
[3] Supra1
[4] Supra 3
[5] 1962 (1) SA 587 (A)
[6] 1962(4) SA 348 (A)

because the Polokwane Magistrate Court was gutted by fire. What can be discerned from the affidavits is that the difficulty in reconstructing the record is compounded by the inchoate magistrate's and defence counsel's notes and the relocation of the prosecutor. In this regard, it is apposite to note the Minister of Justice's response to parliament after 6400 files were destroyed. He said;

"If, however, it happens that a criminal case cannot be reconstructed, the magistrate in whose court the case was presented will submit an application for special review to the Judge for the proceedings to be set aside and order that the case be tried from the onset"[7]

With respect, depending on the circumstances of each case, it is not in all cases that the proceedings may be ordered to start de novo. It is possible that in some of the cases, it may be ordered that the proceedings continue before the same presiding officer, whereas in others where the irregularity is so serious that they per se vitiate the trial, the court may order that the proceedings be set aside and that the matter may start de novo.

[7] I have already intimated that this matter does not reside within an appeal or review concerning a conviction or a sentence. It concerns a matter which was continuing before a presiding officer in order to thereafter consider a conviction or an acquittal. Statutorily, the high court is empowered to issue directives for its supervisory powers over magistrates' court both at common law and under the Constitution[8]. This is well encapsulated by Cameron JA, as he then was, in Magistrate, Stutterheim v Mashiya[9] thus:

"That the higher courts have supervisory power over the conduct at proceedings in the magistrate's court in both civil and criminal matters is beyond doubt. This includes the power to intervene in unconcluded proceedings. This court confirmed more than four decades ago that the jurisdiction exists at common law.[10]*It subsists*

[7] 21 November 2012
[8] Constitution of the Republic of South Africa Act 108 of 1996
[9] 2004(5) SA 209 (SCA) para [13] at 214 F-215 C.
[10] Walhaus & others v Additional Magistrate, Johannesburg & Another 1959(3) 113(A) 119-120

under the Constitution, which creates a hierarchal court structure [11]that distinguishes between superior and inferior courts by giving the former but not the latter jurisdiction to rule on constitutionality of legislation and presidential conduct[12] as well as inherent powers.[13] The Constitutional Court has emphasised the role of the higher courts in ensuring 'quality control' in the magistrates' courts and the importance of the High Court's judicial supervision of the lower courts in reviewing and correcting mistakes.[14] This entails, as Chaskalson CJ has observed, that the higher courts can supervise the manner in which the lower courts discharge their functions.[15] This general formulation echoes the provisions of the CPA, which provides that in Criminal proceedings subject to review in the ordinary course the High Court may, amongst many ample powers, remit the case to the magistrate's court with instructions to deal with any matter in such a manner as it may think fit".[16]

[8] However, before embarking on the special review process, the court has first to attempt reconstruction of the record because the reconstruction procedure is part and parcel of the fair trial process and entails the following: the accused must be informed of the missing portion of the record, of the need to have it reconstructed and of his right to participate in the process. It was further held that once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor of the fact of the missing record and arrange a date for the parties to re-assemble in an open court in order to jointly undertake the proposed reconstruction.[17]

[9] Case law abound that the reconstruction process must give effect to the accused' right to a public trial before an ordinary court, his right to be present when being tried, as well as his right to challenge and adduce evidence. However, one must be

---

[11] Section 116 of the Constitution
[12] Section 167 - 170
[13] Section 173
[14] S v Steyn 2001 (1) SA 1146 (CC) para [17][19] Madlanga AJ
[15] Van Rooyen & Others v State & Others 2002(5)SA 246 (CC) para19
[16] Section 303 of the CPA
[17] Kruger AJ in S v Gora & Another 2010(1) SACR 159 CWCC

mindful of the fact that this right is not absolute. It may be limited depending on the circumstances of each case. What has not become clear is whether accuracy is important. Looking at the scales of a criminal trial, it is of paramount importance that the reconstruction should not be vague, but accentuate the constitutional right of an accused to a fair trial. Yekiso J after reviewing some authorities in S v Zenzile [18] a case in which the division had a duty in terms of section 52(3) of the Criminal Law Amendment Act[19] to ascertain the justiciability of the proceedings in a regional court addressed this and enunciated the law as follows pertaining to accuracy:

'.....Accuracy or the correctness of the record, particularly in instances where the record has to be reconstructed, and where a conviction could lead to an imposition of a heavy sentence, such as life imprisonment, is of paramount importance".

This means the accuracy matter should not be treated lightly in serious offences because it could jeopardise the accused's trial. I pose to examine the meaning of accuracy or correctness in this case.

[10] According to the Shorter Oxford English Dictionary[20], 'accuracy or accurate' means exact or correct; of a thing in exact conformity with a standard or with truth; careful exactness; without error or defect. Whereas 'correct' means, free from error; accurate; in accordance with fact, truth or reason. The meaning I adopt in the context of this case, is that both words should be interpreted as meaning, in accordance with fact, truth, or reason, conformity with a standard or with truth. It is absurd that it should be interpreted as meaning exact, without error or defect. These two words do not convey mathematical accuracy or correctness. The reconstructed record will pass constitutional muster for as long as it does not vitiate the presiding officer's ability to consider adequately conviction or acquittal.

[18] Supra 17 para[17]
[19] Act 105 of 1997
[20] Sixth Edition

[11] Another factor that distinguishes this case from Zenzile is that in casu one is not dealing with an irregularity in an appeal or review in terms of section 324[21]. One is dealing with a part-heard matter in which the record was destroyed by fire. It will be burdensome and onerous to refer all 6400 cases for review. If this is to happen, one must accept that there will be some errors and defects which may be condoned at the review stage. This is exacerbated further by the fact that one is dealing with secondary evidence.

[12] In casu, however nothing appears to show that all the parties have been directed to assemble for the reconstruction of the record. There are preliminary steps that must be undertaken to reconstruct a record as authoritatively stated in *S v Nortje*.[22] It was stated that in cases where the record of proceedings gets lost before being submitted to the High Court, the clerk of the court concerned must submit to the High Court the best secondary evidence he can obtain of the contents of the lost record. There is a five point procedure to be followed as restated in the case of *S v Mahlehlele* [23]:

(a) To obtain a proper affidavit that the record is indeed lost;
(b) To obtain affidavits from witnesses and, if necessary, others present at the trial, as proof of evidence recorded;
(c) Prove in the same way the charge, the plea and all portions of the record;
(d) Submit to the accused the record to be forwarded to see if accused has any objections to the contents of it; and supply proof on affidavit of the reply of the accused;
(e) Obtain a report from the presiding magistrate as to the correctness of the record who will certify whether the record is correct.

In the electronic world in which we now live, the Court Manager may be the best placed person to depose to such an affidavit, as it was done in the instant case. I am however sceptical about the involvement of others present at the trial, who may not necessarily be witnesses or officials of the court.

---

[21] Supra 1
[22] 1950(4)SA 725(E)
[23] [2013] JOL 299 74(ECP)

[13] The peculiarity of this case is the extraordinary circumstance in which the record was lost. There are incomplete notes kept by the defence attorney that is available, a portion of the transcription, and a charge sheet with a record of postponements. It is not desirable for a court to prescribe a uniform course of conduct in matters involving missing records since circumstances of each case vary. Exercising its powers in terms of section 304(3), the Court may in certain circumstances direct a question of law or fact to be argued by the Director of Public Prosecutions and by the Counsel as the Court may appoint.

[14] Remittal on review should only be adopted once the magistrate has taken all necessary steps to reconstruct the record as stated in S v Gora.[24] These include the following attributes: the parties are to express their views on record that each aspect of the reconstruction accords with their recollection of the evidence tendered at trial, and ultimately to have such reconstruction transcribed in a normal way. Once this process has been followed, none of the parties can cry foul that his/her rights have been trampled on.[25]

[15] Another factor that must be considered in the reconstruction of the record is the lapse of time relatively speaking to the memories of the judicial officer and officers of the court. In the case of *S v Rakgoale*[26] the trial was part-heard when both the magistrate's notes and the recording of the proceedings were lost. The magistrate then sent the matter on special review with the suggestion that an order be made that the proceedings be started de novo. The accused was appraised of the developments and had no objection to the matter starting de novo. The court held the magistrate must have some memory of the facts and the prosecutor may have notes and the statements contained in the police docket should be of assistance including the memory of the above parties, whether there were any deviations from the statements. The court refused the application for the matter to start *de novo*.

---

[24] Supra 17
[25] Yekiso J in S v Zengile para[21]
[26] 2001(2)SACR 317(T)

[16] A more enlightening approach to the issue of missing records in partly heard cases is canvassed in *S v Mlotshwa*.[27] There it was stated that:

(a) Where the record of a part –heard criminal case gets lost, there is no reason to declare the part heard trial to be a nullity as the trial was, up to the stage it had reached, a proper, valid trial;

(b) In such circumstances the magistrate or clerk of the court must prepare afresh a record of the disposed parts of the trial, in a fair and reliable way.

(c) Once the record is reconstructed, the magistrate is obliged to recall witnesses to put the restored evidence to them and to enquire whether they agree that it accords with the evidence they initially gave at the trial. The accused should thereafter be afforded the opportunity to cross-examine each witness in regard to their answers to the magistrate's questions, the correctness of the record and the content of their evidence against the accused.

[17] This process does not amount to a trial *de novo*. It overlaps with the part heard trial verification of the contents of the record. In the premise of the loss during a trial of the whole or part of the record, as in casu, that would not affect the validity, regularity or fairness of the trial, nor would it constitute a ground for setting aside the proceedings.[28] However, it has been noted that the presiding magistrate is precluded from directing or supervising any reconstruction procedure before verdict. He is required to decide the case strictly on the admissible evidence before him and therefore cannot during the trial participate in an investigation of possible sources of secondary evidence whereby he will of necessity acquire information, which by definition is not evidence pertaining to issues in the trial. It has been said that the role of the presiding magistrate in a reconstruction before verdict, would be confined to input from his notes and recollection and another magistrate should be requested to direct or supervise the reconstruction procedure. In my opinion, this procedure is untenable. It seems to me that instead of resolving the matter

---

[27] [2006]JOL 15630 (w)para[3]
[28] Supra 27 para[36]

expeditiously, it may instead prolong the proceedings further, more so because two presiding officers are involved.

[18] Since it seems there is no unanimity as to what happens under the unfortunate circumstances of lost records, I would like to refer to the authoritive case of *S v Catsoulis*[29] to conclude this matter. The court held where the record has been lost prior to the closing of its case by the state, the position is as follows:

(i) The magistrate's court itself is entitled to order that the case should commence de novo;

(ii) The same magistrate, who heard the case in part, should preside at the proceedings *de novo.* This will enable him to determine whether the evidence corresponds to that given previously – *S v Dhlomo;*[30]

(iii) Because the case is part-heard, the accused and witnesses are compelled to attend;

(iv) The accused should plead again. This cannot possibly prejudice him.

[19] Generally, once an accused has pleaded he is entitled to have his case heard and finalised. In casu the accused had already pleaded to the charge although, the case has since turned to be a trial-within-a-trial. The proceedings in court remain valid, despite the disappearance of the record. The trial should obviously proceed from where it was left off. There is no legal ground upon which a re-trial at this stage can be ordered either by the trial court or by the superior Court. It is noted from the case law that there is a difference between the trial of an accused and the administrative tasks in connection therewith, for instance, the recording of evidence. More weight of a trial *de novo* is given when the magistrate who started the case is not available to continue with the trial and the first proceedings could be considered void. In this case the magistrate is available even in the instance where he could have been transferred to another station. He should return for the purposes of hearing this

[29] 1974(4)SA371 (T)
[30] 1969(1)SA104(N)at 107

matter because it is part-heard. All this must be done in the interest of justice, which may prevail over the individual rights of the accused.

[20] In conclusion, the court should try its level best to reconstruct the record. This reconstructed record from the best available secondary evidence must then be placed before all parties for scrutiny. For partly heard matters, the trial court is not *functus officio*. Where secondary evidence cannot be obtained owing to the failure of the mechanically recorded evidence, all the witnesses may be recalled to give evidence once again. Thereafter the trial must continue in the normal way.

[21] The order we make is the following:

(a) The processes involving the reconstruction of the record must be completed first.

(b) Once the record has been reconstructed and the parties agree on its correctness or accuracy, then the matter must be proceeded with.

(c) In the event that the parties do not agree on its correctness the matter must be tried *de novo* -only if the disagreement is substantial and relevant to the disputes.

(d) If the disagreement is trivial, the magistrate should record his version of saying so, in order for a review or appeal court to consider whether or not a trial *de novo* should be ordered.

T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

C PRETORIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

IN THE ORDINARY COURSE OF EVENTS