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**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: R25/2022

In the matter between:

**THE STATE**

and

**NHLONIPHO MABASO** **ACCUSED**

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**ORDER**

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The following order is granted:

1. The proceedings before Mr C F Masikane in the Greytown Regional Magistrates' Court under case no GRC 47/2019 are hereby reviewed and set aside.

2. The trial is to commence *de novo* before another magistrate.

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**SPECIAL REVIEW JUDGMENT**

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**Poyo Dlwati ADJP (Chili J concurring):**

[1] This is a special review in terms of s 22(1)*(c)* of the Superior Courts Act 10 of 2013.[1]

[2] The accused was charged with one count of murder read with s 258 of the Criminal Procedure Act 51 of 1977 (the Act), and further read with s 51(2) of the Criminal Law Amendment Act 105 of 1997. The accused was legally represented throughout the proceedings. At a pre-trial conference held on 12 July 2019, the accused indicated that he would not require assessors during the trial, as envisaged in s 93*ter* of the Magistrates' Court Act 32 of 1944. The accused pleaded not guilty to the charges.

[3] When the trial commenced, the prosecutor advised the learned magistrate that the State intended leading evidence of a statement that the accused had made to a magistrate. However, the presentation of such evidence was objected to by the defence on the basis that it was inadmissible as it was not made freely and voluntarily by the accused. It was further submitted that the accused contended that he had been told by the investigating officer what to say in the statement. The State then applied, which application was granted, that the court hold a trial within a trial in order to determine the admissibility of the statement.

[4] Even though the State closed its case after leading the evidence of various witnesses, the accused never testified during the trial within a trial, and the magistrate failed to give a ruling in the trial within a trial. It seems from the record

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[1] Section 22(1)*(c)* of the Superior Courts Act 10 of 2013 reads:
'(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—
. . .
(*c*) gross irregularity in the proceedings.'

that after the State closed its case on 16 September 2021, the matter was adjourned to 12 October 2021. On that date, the prosecutor simply called the next witness without any reference to the trial within a trial. Neither the defence nor the learned magistrate picked up on the error.

[5] It was only during argument on the merits that it was learnt that the accused did not testify and that the learned magistrate failed to give a ruling during the trial within a trial. It was under those circumstances that the learned magistrate stopped the proceedings as the defence argued that the failure to call the accused to testify during the trial within a trial was a gross irregularity necessitating the acquittal of the accused.

[6] In *S v Nglengethwa*[2] the court held that

'the purpose of the trial within a trial is twofold: to provisionally withhold the contents of a prejudicial statement from the Court and to give the accused the opportunity to testify before the closing of the State's case without fear that his evidence will later be used against him.'

The court in *S v De Vries*[3] held that where

'the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt.'

[7] It is therefore clear that the learned magistrate committed an irregularity when he failed to give the accused an opportunity to either testify or close his case during the trial within a trial. It was another irregularity when he failed to make a ruling on the trial within a trial, which is prejudicial to the accused as it affects his right to a fair trial. In *S v Jaipal*[4] the court held that 'an irregularity is

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[2] *S v Nglengethwa* 1996 (1) SACR 737 (A) at 738a-b in the headnote.
[3] *S v De Vries* 1989 (1) SA 228 (A) at 233I-J.
[4] *S v Jaipal* [2005] ZACC 1; 2005 (1) SACR 215 (CC) para 38.

an irregular or wrongful deviation from the formalities and rules of procedure aimed at ensuring a fair trial'. The court further held that irregularities are deviations from 'what one would regularly expect in a properly conducted criminal trial'.[5]

[8] For instance, in a trial within a trial, one would expect the accused person to indicate whether or not he will testify or whether he will close his case without testifying. Thereafter, the presiding officer ought to make a ruling. This will enable the State or even the defence to decide how to conduct its case. However, that is not the end of the matter. One has to consider whether the irregularity was of such a nature as to amount per se to a failure of justice[6] as not all irregularities will result in an unfair trial.[7] As the learned magistrate has not pronounced on the accused's guilt or otherwise, I do not believe that there was a failure of justice. However, if the proceedings were to just proceed, then the irregularity committed is, in my view, likely to cause prejudice to the accused. Stopping the proceedings and having them commenced afresh would cure any prejudice that the accused may have suffered. In the circumstances, these proceedings ought to be set aside and the trial to start *de novo* before a different magistrate.

[9] Accordingly, the following order is granted:

1. The proceedings before Mr C F Masikane in the Greytown Regional Magistrates' Court under case no GRC 47/2019 are hereby reviewed and set aside.

2. The trial is to commence *de novo* before another magistrate.

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[5] Ibid para 44.
[6] *S v Moodie* 1961 (4) SA 752 (A).
[7] *S v Shaik and others* [2007] ZACC 19; 2008 (2) SA 208 (CC) para 44.

[redacted]

**POYO DLWATI ADJP**

I agree.

[redacted]

**CHILI J**