



**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 13900/2021

Swellendam Magistrates Court Review No. 6/21

Before: The Hon. Mr Justice Binns-Ward

and

The Hon Mr Justice Henney

Special review in terms of s 304  
of the Criminal Procedure Act 51 of 1977

In the matter between:

**THE STATE**

and

**TONDERAI PHINEAS MACHINA**

**JUDGMENT dated 18 July 2022**

**BINNS-WARD J (HENNEY J concurring):**

[1] This matter came before us on special review from the magistrate's court. It has had a somewhat tortuous history. It was first brought to court by way of an application in the motion court for an order setting aside the conviction and sentence of the applicant, Tonderai Phineas Machina, arising from the admission of guilt fine paid by him at the Swellendam magistrates' court in Swellendam case no. 1105/2019 on 2 December 2019. The Minister of Police, the Minister of Justice and Correctional Services, the National Director of Public Prosecutions and the Director of Public Prosecutions, Western Cape were cited in that application as the first to fourth respondents, respectively. None of the respondents gave notice of their intention to oppose the application. The third and fourth respondents filed a notice of intention to abide the judgment of the court. When the matter came up before Baartman J on the unopposed roll on 30 November 2021, the learned judge expressed the view that the appropriate procedure in such matters was to apply to the magistrate to send the matter on special review in terms of s 304 of the Criminal Procedure Act 51 of 1977. The matter could, in any event, not be entertained on motion without joinder of the magistrate

[2] The application was duly referred to the acting magistrate at Swellendam who, with commendable expedition, sent the matter on special review on 7 December 2021.

[3] The magistrate's covering memorandum summarised the proceedings in which the applicant paid an admission of guilt fine as follows:

'Mr Machina was issued on 21 October 2019 with a written notice in terms of s 72 of the Criminal Procedure Act No. 51 of 1977 to appear in the Swellendam Magistrates Court on 6 November 2019 on a charge of contravention of Reg 206 read with Reg 239 of the National Road Traffic Act 93 of 1996 – Overloading.

On 6 November 2019 Mr Machina was absent from court and at the request of the State a warrant of arrest was issued and held over until the next day, 7 November 2019, after the State had handed into the record a letter dated 6 November 2019 received from Mr Machina's employer, Onelogix (Pty) Ltd, that he was delayed and would be present at court the following day.

On 7 November 2019 Mr Machina appeared before the court for the first time and according to the case record it was remanded to 25 November for payment of admission of guilt and Mr Machina was warned to appear on the aforesaid day.

According to the case record as per the J15 the accused's nationality is indicated as Zimbabwean, but no indication is made on the record what language the accused speaks and whether he understands English. [The supporting affidavit deposed to by Mr Machina in the application brought before Baartman J was in English, which suggests that he is competent in the language.]

The presiding officer .... had further not indicated on the record that the accused's rights to legal representation, and if he cannot afford it, his right to Legal Aid, were explained to him.

On 25 November 2019 Mr Machina was again absent from court and a warrant of arrest was issued for immediate execution.

On 2 December 2019 the accused was supposed to appear before the court on the warrant of arrest issued on the previous date, but the case record of 2 December 2019 only reflects that the warrant was cancelled, no warrant enquiry held and the case was transferred to the admission of guilt register.

According to the case record the matter was transferred to the Admission of Guilt Register after the accused, Mr Machina, had paid admission of guilt in the amount of R5000 ...on a charge of contravention of Reg. 236(1) read with Reg. 1, 236(2)(e), 241, 245 & 333(m) of the National Road Traffic Regulations 2000 & Sect. 1, 69(1), 73&74 of Act 93 of 1996 – Overloading.

There is further an Annexure attached to the record in terms of which the Senior Control Prosecutor had in terms of Sect. 57A of the Criminal Procedure Act 51 of 1977 set an amount of R5000 admission of guilt on a charge in which it was alleged that *“upon or about the 29<sup>th</sup> day of October 2019 and at or near N2 Swellendam in the said district he had wrongfully and unlawfully operated a vehicle of which the permissible combination mass load of 25100 kg was exceeded with 34.18% to wit 8580 kg actual mass 3360 kg.”*<sup>1</sup>

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<sup>1</sup> It is evident that the figure 3360 should in fact have read 33680.

Further attached to the record is an Annexure to the Written Notice to appear in court, which was signed by Mr Machina. In this document Mr Machina acknowledged that he had been informed of the consequences of paying the admission of guilt fine:

*“YOU ARE HEREBY INFORMED THAT: You are in terms of section 73(2A) of the Criminal Procedure Act (Act 51 of 1977) entitled to be represented at your own expense by a legal adviser of your choice for purpose of this criminal proceedings. If you cannot afford legal representation, you may apply for legal aid at the local Legal Aid Office or Office for the purpose of this criminal proceedings.*

- *Should you pay the admission of guilt fine, you will be deemed to have been convicted and sentenced by the court with jurisdiction in respect of the stipulated offence(s).*
- *On payment of the above-mentioned admission of guilt fine, such conviction will appear on your criminal record.*
- *On payment of the above-mentioned admission of guilt fine, you waive the right to –*
  - \* be sentenced only upon proof beyond reasonable doubt that you are guilty of the commission of the stipulated offence(s);*
  - \* contest the allegation(s) in open court;*
  - \* confront your accuser(s);*
  - \* call witnesses; and*
  - \* Legal representation.*
- *You are also entitled to make a representation to the Public Prosecutor for the reduction of the admission of guilt fine or the institution of the prosecution.”*

However, the presiding officer on that day, Mr E..., had made no indication on the case record of 2 December 2019 whether the accused had indeed appeared before court and whether the accused had confirmed that his rights to dispute the allegation against him, and the legal effect and consequences of payment of admission of guilt were explained to him before he paid the admission of guilt.’

[4] The acting magistrate submitted, on the basis of the information set out in his memorandum, that it did not appear *ex facie* the magistrates court record that the proceedings were in accordance with justice, and he consequently recommended that the conviction and sentence be reviewed and set aside and the fine remitted.

[5] In his supporting affidavit in the application brought before Baartman J, Mr Machina averred that he had been stopped at a weighbridge check and informed that the vehicle on which he was transporting a manifest of vehicles from Volkswagen Uitenhage to Avis Rent-a-Car Cape Town was overloaded. This surprised him as he had carried similar loads previously on many occasions without any suggestion at traffic-controlled weighbridges that they exceeded the permissible limit. He was detained for half a day before being permitted to leave after being issued with a warning to appear in court on 6 November 2019. He was engaged in making deliveries elsewhere on that date and his employer arranged for him to appear in court at a later date. He made no mention of having appeared in court on 7 November, as the attached letter from his employer suggested he would. He stated that when he appeared at court on 25 November he was presented with 'a certificate in terms of section 57A of the Act, which certificate granted [him] the option of paying an admission of guilt fine of R5 000'. It appears from what he said in his affidavit that Mr Machina must have read the 'certificate' and that he appears to have appreciated the nature of the alleged offence for which he had been charged.

[6] He said that he was also presented with a charge sheet and noted that the content of the charge sheet contradicted the 'written notice' (apparently the forementioned 'certificate') in that it referred to reg. 236(1) and (2)(e) instead of reg. 239(3) of the National Road Traffic Regulations. The affidavit does not make it clear whether he noted the contradiction at the time, or only at some unidentified later state.

[7] He said he agreed to pay the admission of guilt fine and advised that his employer would make the payment on his behalf. He was told that he had to sign the admission of guilt then or there or he would not be released and would not be allowed to leave the courtroom. He said he signed the document without reading it and did not appreciate that it would result in a conviction being reflected on his

record. He claims that if he had realised that he would incur a criminal record he would not have signed it but contested the charge. He said that he had on a number of previous occasions been charged with overloading and his employer had paid admission of guilt fines without that resulting in him obtaining a criminal record. He said that his employer paid the fine on 2 December 2019. It is well established that an accused person who is invited to pay an admission of guilt fine must be advised of the consequences as to the incurrance of a criminal record; see *S v Parsons* 2013 (1) SACR 38 (WCC), *S v Tong* 2013 (1) SACR 346 (WCC) and *S v Mutobvu* 2013 (2) SACR 366 (GNP).

[8] Mr Machina's evidence suggests that he did not appear in court on 25 November 2019 because he signed an admission of guilt on that day and was given to understand that he could leave. It also explains why the matter was dealt with on the record on 2 December in the manner described in the acting magistrate's memorandum quoted above. It seems probable that the magistrate dealt with the matter in the manner described on 2 December after being informed that the admission of guilt fine had been paid. A receipt for the payment of the fine was issued by the clerk of court on that date.

[9] I referred the matter for comment to the Director of Public Prosecutions. It was indicated in the covering memorandum that I was concerned about the appropriateness of disposing of the matter on special review in the context of the obvious contradiction between the accused's assertion in his affidavit that he had not had the consequences of admitting guilt explained to him and his written acknowledgement on record in the proceedings in the magistrates court that the consequences had been explained to him and also the peace officer's written certification on record that he had 'personally explained' to the accused that he would be deemed to have been convicted and sentenced by a court, and that the conviction would appear on his criminal record. It appeared to me that the situation was one in which a competent review could ensue after the conflict of fact had been judicially resolved in review proceedings in terms of Uniform Rule 53.

[10] In the comment submitted by Adv. *Galloway* of the Directorate of Public Prosecutions, for which the court is grateful, the contradiction on the record - which

had not been noted in the acting magistrate's memorandum - was acknowledged. Ms *Galloway* submitted that 'the record of the proceedings is in conflict with the accused's averments and must be settled before a Reviewing Judge can decide whether the accused has satisfied the requirements [as to which see, for example, *S v Cedras* 1992 SACR 530 (C) at 532a-b] for setting aside the deemed conviction and sentence.' Ms *Galloway*'s memorandum proceeded:

'8.13 As a result, in my view, the matter cannot be dealt with as a special review but should be done by way of a notice of motion proceedings so as to afford all possible respondents an opportunity to reply to the accused averments by way of affidavit.

8.14 Given the apparent difference between the submissions made on the accused's behalf and the record of proceedings, I am of the view that it may not be in the interests of justice to receive the new evidence as submitted on behalf of the accused, without it being subject to cross-examination.

8.15 As is evident from the papers submitted to the Hon. Reviewing Judge, the matter was initially brought before this Division by way of notice of motion.

8.16 The papers were served on the Director of Public Prosecutions (as fourth respondent) and the Minister of Police (as first respondent).

8.17 On 28 August 2021 the Director of Public Prosecutions filed a notice to abide and from copies of correspondence contained on file, so did the SA Police Service.

8.18 Accordingly, there can be no objection to the conviction and sentence being set aside and the matter being remitted for trial, should the public prosecutor so decide. There is no appreciable risk of prejudice to the state. The admission of guilt fine should be repaid to the accused or his employer.'

[11] I understand the submission of the Directorate of Public Prosecution to accord with my prima facie view that this is not a matter to be dealt with on special review under the Criminal Procedure Act, but to argue that, as matter of practicality, in view of the absence of opposition from any of the respondents cited in the application brought in the motion court, an order should nevertheless be granted substantially as prayed in those proceedings and also proposed by the magistrate in the special review. The question is should such an order be made in these proceedings, or should the matter be remitted to the unopposed motion court where it began in November last year. Technically it should go back to the motion court, but in the peculiar circumstances that would result in an unnecessary wasting of time and cost (cf. *S v Houtzamer* [2015] ZAWCHC 25 (10 March 2015) in para 2). An order will therefore issue in the form proposed by the Directorate of Public Prosecutions.

[12] I should record that judgment in this matter was delayed because the file was removed from my chambers when the forementioned application in the motion court was unaccountably set down for hearing in the Fourth Division on 22 April 2022, and when it was returned after the matter was removed from the Fourth Division roll, it no longer contained Ms *Galloway*'s memorandum and a replacement copy had to be requisitioned.

[13] An order will issue in the following terms:

1. The conviction of and sentence imposed on the accused in Swellendam magistrates court case no. 1105/2019 (the applicant in High Court of South Africa, Western Cape Division, Cape Town, case no. 13900/21), Tonderai Machina are set aside.
2. The terms of paragraph 1 hereof shall not preclude the Directorate of Public Prosecutions, if so advised, from pursuing the prosecution of the accused on the same charge in the ordinary course.
3. The amount of the admission of guilt fine in the sum of R5000 shall be refunded to the accused's employer Onelogix (Pty) Ltd.



**A.G. BINNS-WARD**  
**Judge of the High Court**

**R.C.A. HENNEY**  
**Judge of the High Court**