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

HIGH COURT REF NO: 371/2022
REVIEW CASE NO.: 347/2021
MAGISTRATE'S SERIAL NO.: 24/2022

In the matter between:

THE STATE

v

MARIUS KOTZE **Accused**

and

HIGH COURT REF NO:363/2022
REVIEW CASE NO.: 43/2020
MAGISTRATE'S SERIAL NO.: 22/22

In the matter between:

THE STATE

V

SIVE NTULO **Accused**

JUDGMENT DELIVERED: TUESDAY, 25 JANUARY 2023

Lekhuleni J et Nziweni J:

[1] This judgment deals with two separate matters namely, *S v Marius Kotze* and *S v Ntulo* that were submitted for automatic review by the Senior Magistrate of Worcester. The Senior Magistrate, referred these two matters on special review in

terms of ss 302 and 303 of the Criminal Procedure Act 51 of 1977("the CPA"). This is pursuant to an inspection done by a judicial quality assurance officer in Worcester and Laingsburg Magistrates Court. Apparently, after the judicial quality control inspection was done, the judicial quality assurance officer requested the Senior Magistrate to submit these matters on special review, after she noted mistakes and irregularities on the record. We discuss these cases hereunder sequentially.

S v Marius Kotze

[2] In *S v Marius Kotze*, the concern raised by the judicial quality control officer are as follows:

"The accused was unrepresented before court on the day that he pleaded. According to the charge, the accused was charged with the main count of driving under the influence of alcohol and the alternative count was driving while the concentration alcohol in his blood was not less than 0.05gr / 100 ml. The magistrate found the accused "guilty as charged" without indicating whether he was referring to main or the alternative count.

During the questioning in terms of section 112 (1) (b) of the CPA, the accused informed the court that he was still capable of driving a motor vehicle and that no accident had taken place. The magistrate never questioned the accused regarding the concentration alcohol (*sic*) in his blood."

[3] According to the Senior Magistrate, the judicial quality assurance officer held the view that; in the circumstances, the magistrate ought to have entered a plea of not guilty in terms of section 113 of the CPA.

[4] On the other hand, the Senior Magistrate stated in his letter that he differs with the view held by the judicial quality officer. This is so because, during the plea, the accused stated that he was not able to drive the motor vehicle in the same way as when he is sober. The Senior Magistrate also based his argument on the admission made by the accused that his driving ability at the critical time was impaired. Instead of setting the proceedings aside as proposed by the judicial quality officer, the Senior Magistrate has suggested that this Court ought to amend the conviction from guilty as charged, to reflect guilty of the offence of contravening section 65 (1) (a) of the National Road Traffic Act 93 of 1996 ("the NRTA"), often referred to as "drunk driving".

[5] Unfortunately, the situation in these cases is not a straightforward issue. Before turning to consider the merits and demerits of the conviction in both cases we wish to make some preliminary observations about the use of pro-forma forms in trials and plea proceedings as we observed in these cases.

This is because, having perused the record, we observed that in both cases the proceedings were not mechanically recorded but were somewhat recorded in long hand. Consequently, apart from the concerns and observations made by the Senior Magistrate and the judicial quality assurance officer; in our view, the starting point in, these matters is to assess the quality and the completeness of the record.

The use of pro-forma forms in plea proceedings

[6] The striking feature of these two cases is that the questioning in terms of section 112 (1) (b) of the CPA, was hand written, on a pro-forma form. Secondly, a closer

examination of the record in *S v Marius Kotze* revealed another pro-forma document annexed to the record ["The unidentified pro-forma form"].

[7] On close scrutiny of the unidentified pro-forma form, we noted that it has no date, not paginated, no case number, and certain information is not filled out. Lastly, the only thing which is filled out in the unidentified pro-forma form is the the election made by the accused, in relation to the question of whether the accused understands the explanation given in terms of section 112 (1) (b) of the CPA.

[8] On the face of it, and looking at its content and the record, it becomes clear that the unidentified pro-forma form is meant to make the record complete. On top of that or perhaps more importantly, in the identified pro-forma form there is also a section headed "the plea." Under the heading "the plea", the following appears:

> "The prosecutor puts the charge(s) to the accused. The plea is recorded on the J15/175/534".

It is apparent from the record that the unidentified pro-forma form is used generally by the magistrate in his section 112 (1) (b) proceedings.

[9] Insofar as can be made out, it appears the record of the plea proceedings is basically made out of two pro-forma documents. One being the questioning in terms of section 112 of the Act, this one has pre-populated questions with blank space to record the answers from the accused. While the other one, is the unidentified pro-forma form, with pre-filled or pre-populated information.

[10] The prepopulated form [the undetermined pro-forma form] is as follows:

"Page no……..

			CASE NO	
PRESIDING OFFICER: MAGISTRATE				
PROSECUTOR		Ms/ Mr		
DEFENCE	IN PERSON	Ms /Mr		
INTERPRETER		Ms/Mr	LANGUAGE	
Casual interpreter had taken the oath or affirmation of true and correct interpretation in terms of rule 68 95) of the Magistrates' court rules				

RIGHTS TO LEGAL REPRESENTATION, DOCKET ACESS AND THE TIME TO PREPARE DEFENCE EXPLAINED

The right to Legal Representation, legal aid assistance as well as his rights to bail, the right to docket access and the right to be given adequate time and place to prepare a defence are fully explained to the undefended accused . the accused elects /prefers to:-

☐apply for legal aid. Mr /Ms ……..of L.A.B. comes on record for the accused

☐conduct his/her own defence ☐appoint legal representative of own choice

☐does not require docket access ☐requires docket access

☐does not require time to prepare defence ☐ does not require time to prepare a defence

EXPLANATIONS BEFORE PLEA TO UNDEFENDED ACCUSED

By tendering a plea of guilty you may waive your right to-

be convicted only upon proof beyond reasonable doubt that you are guilty of commission of the stipulated offence(s);

contest the allegation(s) in open court; confront your accuser(s); call witnesses; to remain silent and not be compelled to give self incriminating evidence.

Please further note that a conviction and sentence will appear on your criminal record? (sic)

The accused confirms that he/she understands all the above mentioned explanations

THE PLEA

The prosecutor puts the charge(s) to the accused. The plea is recorded on the J 15/175/534

SECTION 112 (1) (b) ACT 51 OF 1977 EXPLANATION TO THE ACCUSED

The court explains the following to the accused:- . . .

Do you understand the explanation and are you willing to answer the court's questions? ANSWER : ☒YES (mark with X)

QUESTIONING BY COURT

Q. Do you plead guilty freely, and without undue influence?

A

CONTINUE OVER PAGE"

[11] It hardly needs to be pointed out that plea proceedings are a very critical stage in the criminal justice process. It is settled that the magistrate's court is a court of record. The creation of an accurate court record fulfils an important role in the administration of justice. The court has a duty to maintain a record for the possibility of appeal or review. The record is meant to reflect the happenings of the hearing. The court of record has to maintain an account of everything that occurs during the court proceedings. This includes the interaction between the prosecutor and the court and the role played by the prosecutor during the proceedings. It should be remembered that ultimately the record of the proceedings in a criminal trial is not only there for the benefit of the magistrate, but for any other court which may have to consider it subsequently, and as such it should be an objective and accurate portrayal of what

transpired during those proceedings. See *S v Fransman and Another* 2018 (2) SACR 250 (WCC) at para 16.

[12] Primarily, the court records its proceedings either mechanically or long hand. It often occurs that pro-forma forms are used especially, for judicial officers in training. Though the use of pro-forma forms is generally accepted, the utilisation of the pro-forma forms cannot be considered to substitute or fulfil the function of a shorthand or the mechanical recording of proceedings.

[13] The crucial point is that, the keeping of record has to be spontaneously and progressively generated during the course of the hearing. Equally essential to the record of the proceedings is that it is meant to be a 'word-for- word' or in a narrative form and chronological recording of everything that occurs at the time when the events occur or when the evidence or the interaction between the court and a party is being done, during the hearing. (See rule 66(1) of the Magistrates Court Rules). In essence, the record of the proceedings is entered into the record at the time they are generated. The record is recorded in sequence as utterances are made; in order to capture the reality of the events and every course of action that happened during the proceedings. Therefore, an exchange between the court and the parties is originated at the same time in which it was documented. As such, the record gives evidence that a particular action or interaction took place or that a certain decision was made.

[14] It then means that what happens during the plea proceedings must be accurately recorded at the time the account is given. This *inter alia* ensures the

accuracy and the integrity of the record. Hence, it is advisable and desirable for presiding officers to prefer digital recording than shorthand recording save for in exceptional circumstances due to faulty recording machines or power failures/ outages.

[15] The longhand recording is the handwritten account of the court's recording of the hearing. Moreover, it is essential for a presiding officer who is using the longhand form of recording, to record whatever is said at the moment the statement is made. Unlike the recording of a hearing, a pro-forma form is an intentionally created document; it is not in real time.

With most pro-forma forms the information is not filled at the moment in which the events or exchange occurs. While pro-forma forms may be useful guide for magistrates in training and serve a certain purpose before the actual hearing of the plea; it does not follow, however, that they can be used as contemporaneous recordings. Importantly, they limit presiding officers to record everything because quite often the spaces allocated for the recording of the magistrate is limited.

[16] The use of pro forma forms does not absolve presiding officers to record faithfully and diligently court proceedings as the case progresses in court. It is therefore critical that any activity during proceedings must be recorded at the execution time.

[17] In the present case, it is evident that the 'undetermined pro-forma form' was a pre-recorded record. We say this because the information contained in the undetermined pro-forma form was clearly recorded before the hearing. The obvious problem with using pre-recorded pro-forma forms is that; they may create an impression that a certain action was done whereas it was never done. Pro-forma forms are not really a reliable mechanisms of accurate record keeping. It's bad practise to use pro forma forms with the aim of completing the record later.

[18] It is a fact that the magistrate have to deal with excessive caseload and congested court rolls. However, the increase in the court caseload, should not compromise judicial performance.

It is therefore important to avoid using pro-forma forms as it may be difficult to determine what they signify in the bigger scheme of the record, during review or an appeal.

Inadequate record

[19] This case is a textbook example of the shortcomings of using pro-forma forms. For the sake of clarity and to avoid confusion, we consider a useful exposition of the two pro-forma forms in question as necessary. The pro-forma form pertaining to the questioning in terms of section 112 of the Act reveals the following:

"Q. . . Do you understand the charge against you?

A Yes.

Q Are you pleading guilty freely, voluntarily and without undue influence?

A Yes

Q Were you the driver of motor vehicle with Y [. . .] on 19 /08/2019 at N1, Laingsburg Street in the district

A Yes

Q Is this mentioned street a public road in the district of Cape Town

A Yes

Q Describe what led to you apprehension

A I was coming from JHB. My car ran out of petrol about 22-30 KM before Laingsburg. I decided to stop and open my beer while I was waiting. Somebody from Engen came to assist with petrol. I drove to Shell garage. After police stop arrested me (sic).

Q On what facts do you base your plea of guilty?

In other words- why do you say you are guilty and guilty on what?

A **I am guilty on blood report and also exceeding the required amount**. (~~own~~-our emphasis)

Q Did you consume any intoxicating liquor/ alcohol prior to your driving the said vehicle on the said road and if so what did you consume and how much?

A I did consume alcohol. It was 6 packs of beers.

Q Were you in anyway affected by the consumed intoxicating /liquor/alcohol and if so to what extent?

A I was still capable of driving no accident to person or ppty (sic).

Q Were you under the influence of intoxicating liquor/alcohol while driving the said vehicle on the said public road?

A Yes.

Q Were you able to drive your motor vehicle in the same manner and with the same measure of safety, caution, skills and care as when you drive your vehicle fully sober.(sic)

A No.

Q Did the intoxicating liquor or alcohol you consumed **affected** (sic) or impaired (sic) your driving skills and driving judgment normally required of a driver in the handling of a motor vehicle?

A Yes.

Q Do you admit that while driving the said vehicle on the said public road, your facilities – and your ability to drive the said vehicle were, to such an extent **impaired** by the consumption of the intoxicating liquor/alcohol that you were unable to drive the said vehicle with the same measure of safety, caution and care than you would have, had you been sober?

A Yes.

Q Put otherwise – Do you admit that you lacked the necessary skill and judgement normally required in the manipulating (sic) of a motor vehicle and that such skill or judgement has been diminished or impaired as the result of consumption of alcohol?

A Yes.

Q Did you at all times know it is an offence to drive a vehicle on a public road while under the influence of intoxicating liquor /alcohol and that such offence is punishable in a court of law

A **No answer given by accused** (Own remark and emphasis)

Q Did you have any lawful excuse or reason for driving the vehicle under the influence of intoxicating liquor /alcohol (sic)

A **Yes. (Our** emphasis)

Q Do you admit that you are guilty to the offence of contravening section 65 (1) of the NATIONAL ROAD TRAFFIC ACT, ACT 93 of 1996 in that you drove your said motor vehicle on the said public road while you were under the influence of intoxicating liquor.

A Yes.

FINDING

☒The court is satisfied that the accused is guilty of the offence to which he/ ~~she~~ has pleaded.

. .

[20] On a separate pro-forma form the following appears:

" FINDING

☒The court is satisfied that the accused is guilty of the offence to which he/she has pleaded guilty.

The prosecutor accepts the plea(s) and the facts on which it is based. Proceedings continue hereunder. . .

LAB Report admitted as Exhibit "A" (hand written insertion)

JUDGEMENT – RECORDED ON J15/~~175/534~~. . .

[21] First and foremost, the questioning by the magistrate is rather confusing as it straddles both the elements of a contravention of section 65 (2) (a) of the National Road traffic Act, 93 of 1996, (the RTA) read with certain sections of the Act, and a contravention of section 65 (1) (a) of the RTA. What further complicates the issues in this matter is the fact that the accused was charged with a main count together with an alternative. Moreover, it is not clear from the record which charge was put to the accused during the plea proceedings. On top of that, the J15 form simply shows that the accused pleaded guilty and was found guilty as charged.

[22] In the pro-forma form, it is endorsed by the magistrate that the accused was found guilty of the offence he pleaded guilty to. The questioning of the accused by the magistrate reveals that the accused stated that he is guilty 'on blood report and of exceeding the required limit'.

However, the J15 does not indicate on which charge the accused pleaded to. In the context of this matter, the fact that the purported questions and answers in the pro-forma shows that the accused answered to the question by the court that he was pleading guilty to a contravention of section 65 (1) of the Act does not cure the shortcomings.

[23] Another problem with the questioning is the fact that,the accused was questioned by the magistrate as to whether he was aware that at all time it is an offence to drive a vehicle on a public road while under the influence of intoxicating liquor /alcohol and that such offence is punishable in a court of law. There is no answer recorded in the pro-forma form to indicate whether the accused gave an answer to this particular question.

[24] Additionally, the pro-forma reveals that after the magistrate asked the accused if he had any lawful excuse or reason for driving the vehicle under the influence of intoxicating liquor, the accused indicated that he had an excuse. During the questioning by the magistrate the accused also stated that he was still capable of driving and that he did not cause any accident. This answer from the accused neutralises or makes hollow of his admissions that he was not able to drive his motor vehicle in the same manner and with the same measure of safety, caution skill and care as when he drives when he is sober; and that the alcohol he consumed affected or impaired his driving skill and judgment. In such circumstances, it does not at all follow that these admissions are worthy. Particularly, without any elaboration from the accused. As a result, many aspects of this matter remain obscure.

[25] This finding of the magistrate is not supported by the record and the facts of this case. Consequently, the conviction and sentence imposed by the magistrate must be set aside.

S v Sive Ntulo

[26] In *S v Sive Ntulo,* the Senior Magistrate raised the following concerns:

"The accused had been charged with the offence of reckless or negligent driving. The accused did not have legal representation. After the magistrate completed his questioning in terms of section 112 (1)(b) of the CPA, the accused was found 'guilty as charged'. This was incorrect since an accused person can be found guilty either on a charge of reckless driving or negligent driving but not both. From the answers that the accused provided during questioning, it is clear that his intention was to plead guilty to a charge of reckless driving. I humbly request his honour the Review Judge to amend the conviction in order to reflect that the accused was found guilty of a charge of reckless driving. The sentence which was imposed by the magistrate was subject to automatic review… I apologise for the fact that the matter was not sent on automatic review within seven days of finalisation."

[27] The accused was facing a charge of Reckless and Negligent driving in contravention of section 63 of the National Road Traffic Act 93 of 1996 ("NRTA"). The state has alleged that the accused drove, a Toyota Quantum, on 13 December 2019, on the N1 public road recklessly or negligently. Legal Aid South Africa originally represented the accused. On the trial date, the accused terminated the services of Legal Aid and opted to conduct his own defense. As a result, Legal Aid was excused, and the trial proceeded.

[28] The charges were put to the accused, and he pleaded guilty. Thereupon, the trial court proceeded to invoke the provisions of section 112(1)(b) of the CPA. The

court asked the accused to explain what happened that led to his arrest. In response to this question, the accused admitted that on the day in question, he drove his vehicle on a public road and overtook a truck on a barrier line. When so doing, a traffic officer was driving behind him. The traffic officer immediately stopped him and thereafter arrested him. Pursuant to this admission, the court *a quo* found the accused 'guilty as charged'. The trial court did not indicate whether the accused was found guilty of reckless driving or negligent driving. The Senior Magistrate, who referred the matter for special review is of the view that from the record of proceedings, the intention of the accused was to plead guilty to a charge of reckless driving. We disagree.

[29] It is trite that driving a vehicle is an activity that demands a high degree of skill, attention, and consideration lest the vehicle, while it is in motion, become the cause of harm or damage to persons or property. *Minister van Vervoer v Bekker* 1975 (3) SA 128 (O) 133D-F. Therefore, a reasonable person when driving a vehicle would drive with moderation and prudent common sense, blending optimism with caution. See Burchell *Principles of Criminal Law* 5 ed (2016) at 814.

[30] There is a difference between reckless and negligent driving. The legislature clearly intends a distinction between the two concepts because different punishments are prescribed depending upon whether the accused was reckless or negligent. *S v Van Zyl* 1969 (1) SA 553 (A). A license suspension is automatic in the case of a conviction on reckless driving. The distinction between the two concepts lies in the degree of negligence imputed on a driver. Recklessness is a grosser and more aggravated form of carelessness, while negligence a lesser form. A driver who drives

in a grossly negligent manner drives recklessly. See Burchell *Principles of Criminal Law* 5 ed (2016) at 816. The difference between ordinary negligence and gross negligence is one of degree. Whether a conduct constitutes reckless driving will depend on the circumstances of each case. In each case, the court must make a value judgment.

[31] In *casu,* we hold the view that the information elicited on the record lacks essential details for a finding on reckless driving. It is not clear whether the accused overtook the truck on a blind rise or in the face of oncoming traffic. It is also not clear what the speed of the truck was when the accused executed the maneuver. It is also not clear at what speed the accused drove when he overtook the truck. It is unclear whether it was at night or during the day when this incident happened. It is also unclear whether the accused had passengers in his vehicle. Simply put, the trial court did not question the accused to determine the accused's degree of negligence. This conflicted with the injunction set out in section 63(3) of the NRTA, which enjoins a court dealing with a case of reckless or negligent driving to consider the nature, condition, and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic on that road, the speed, and manner in which the vehicle was driven.

[32] The questioning of the accused in terms of section 112(1)(b) of the CPA was deficient and superficial. It seems the court *a quo* was limited by the space available on the pro forma to question the accused further and elicit information on the

accused's degree of negligence. Such a dereliction of responsibility is reprehensible and cannot be countenanced.

[33] We have also observed that upon sentence, 'the court made an order that in terms of section 35(5) of the NRTA, the license of the accused is not endorsed. It seems the magistrate intended to make that order in terms of section 35(3) of the NRTA. For completeness, the section provides:

(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit. (our emphasis)
(4) A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3), to the notice of such person.

[34] Sections 35(3) and (4) make it clear that before a sentence is imposed in a matter where there is an automatic suspension of a license upon conviction, the accused must be informed of the right to present evidence under oath as to why the suspension order in terms of section 35(1) should not take effect. The introduction of section 35(3) in the NRTA was intended to test under oath and through cross-examination the veracity of the circumstances relating to the offence during evidence in respect of sentence. This provision was introduced so that the court can be placed

in a better position to decide on whether a suspension order is appropriate or not. *S v Pedro* 2021 (2) SACR 102 at para 33.

[35] In this matter, the court below made the order without hearing evidence under oath. In making the order, the court noted that the accused is a first offender, a truck driver, and a breadwinner supporting his children. This information was not presented under oath. In our view, it was irregular for the court below to make such an order without following the procedure set out in the NRTA. Furthermore, if the conviction was on reckless driving, in that case, the appropriate order should have been that the suspension order envisaged in section 35(1) of the NRTA shall not take effect. Nonetheless, on the facts before us, we are of the view that the accused was negligent and that his conviction should be amended accordingly to that of negligent driving.

Conclusion

As we had previously noted, there are a slew of problems in these matters. The first problem is with the use of pro-forma forms. It must be pertinently stressed that the use of pro-forma forms in plea proceedings is not encouraged. It must be used sparingly. These cases reveal the extent to which pro-forma forms can make the record to come across as being murky.

Secondly, and more substantively, there are several incongruities in *S v Kotze* arising from the questioning of the accused by the magistrate. Notwithstanding the foregoing, the accused was found 'guilty as charged'.

ORDER

[36] In the result, the following order is granted:

S v Marius Kotze:

1. The conviction and sentence in case number 347/21 are hereby set aside.

S v Sive Ntulo:

2. The conviction in case number 43/2020 is hereby reviewed and set aside.

The accused is found guilty of a contravention of section 63 (1) of the NRTA (negligent driving).

[redacted]

Lekhuleni, J

[redacted]

Nziweni, J