IN THE HIGH COURT

(BISHO)

CASE NO.: CA&R60/02

DATE: 16 MAY 2003

In the matter between:

MKHULULI MZANA & 2 OTHERS

versus

THE STATE

EX TEMPORE JUDGMENT:

EBRAHIM J:

On 2 July 2002 the three appellants in this appeal noted an appeal against their conviction in the Regional Court sitting at Zwelitsha. The notice of appeal in this regard reads as follows:

> "The appellants hereby note an appeal to the High Court of South African (Bisho Division) against the judgment of the learned Magistrate, Mr Gwababa, handed down on 22 April 2002 at Zwelitsha Regional Court."

A further portion reads as follows:

> "The appeal is noted only against conviction and sentence of the learned Magistrate."

The notice of appeal then specifies that the appeal is based on certain grounds of fact and law and these are set out in the notice of appeal as follows:

> "1. The learned Magistrate erred in finding that the appellants are guilty of murder and that they were not acting in self-defence.

2. The learned Magistrate erred in holding that the State had made a *prima facie* case."

I quote this because is has a certain relevance in terms of the appeal itself and to some degree impacts on the decision that this Court is making in respect of this appeal.

Thereafter the appeal was prosecuted and on 7 February 2003, which was allocated as the date of hearing, there were appearances on behalf of the appellants as well as the State. It appears that the appeal could not proceed on 7 February 2003 as the appeal record was incomplete. In this respect it appears that the evidence-in-chief of the second appellant has been omitted from the record of the proceedings in the Court *a quo*. In consequence of this defect in the appeal record the appeal was postponed to 2 May 2003. On 2 May 2003 the Court hearing the appeal was differently constituted as the one on 7 February 2003 and, after considering the submissions made on behalf of the appellants by Mr Mdlalana and the submissions made by the State, this Court issued an order in the following terms:

"1. Mr Templeton McDonald Mdlalana, the appellants' attorney of record, is called upon to explain on affidavit to be delivered by not later than 13 May 2003-

(a) why the record of appeal is still incomplete;

(b) why the provisions of Rule 51 of the Uniform Rules of the High Court have not been complied with;

(c) why the appeal should not be struck from the roll;

(d) why the wasted cost of today should be borne by the appellants personally.

2. The appeal is postponed to 16 May 2003."

In compliance with this order Mr Mdlalana filed an affidavit dated 13 may 2003 in which he offers an explanation in regard to what has transpired in attempting to reconstruct the record or to obtain the transcription of the missing portion of the record. I return to this affidavit in due course.

In amplification of this affidavit Mr Mdlalana has submitted today that the appellants and their attorney of record have done whatever they could to have the missing portion of the record prepared. It appears that the cassette dealing with the evidence-in-chief of appellant no. 2 has gone astray. Mr Mdlalana has pointed out to the Court that there are two courses of action that the Court should entertain. Firstly, he suggests that the matter be postponed until a further date and that the appellants be afforded a further opportunity of attempting to have the missing portion of the record prepared, or reconstructed; alternatively, he conceded, that the appeal may also be dismissed by this Court.

During the course of his submissions an attempt was made to obtain from Mr Mdlalana details of the precise steps that have been taken to locate the missing cassette and to have same prepared so that the record may be complete. Alternatively, if the missing cassette could not be found what steps have been taken to have the record reconstructed. A great deal of time was spent this morning in trying to ascertain what these precise steps were. Regrettably, Mr Mdlalana's explanations did not amplify what was contained in his affidavit. In fact the explanations he offered compounded the situation insofar as this is concerned. Let me

quote the relevant portion of the affidavit which sets out what has been done thus far to ensure that the record is complete. I refer to Paragraph 5 of Mr Mdlalana's affidavit dated 13 May 2003:

> "In explaining what I have done I went to Clerk of the Court at Zwelitsha Magistrate's Court. I asked them to complete the record. I was promised that they are going to look into this and return back to me. In Court a quo I was not the one who was doing the case. I contacted the lawyer who was doing this to arrange with him in order to fill up the missing evidence. I also indicated to the control Prosecutor in Zwelitsha Regional Court who advised me we need to inform the Magistrate who was doing the case. It is unfortunate that up until now the complete record is not before the Court."

In his affidavit Mr Mdlalana has recognised, and rightly so, that the ultimate responsibility of ensuring that the copies of the record placed before the Court of Appeal are proper in all respects, rests on the appellant or his attorney. However, he has sought to lessen that responsibility by averring in the affidavit that the primary responsibility for forwarding proper copies is that of the clerk concerned, and I presume he means the Clerk of the Regional Court.

Mr Kristafor who appears for the respondent, namely the State, first submitted that painful as this may be for the appellants, and for others concerned, that the proper course at this stage was for this Court to dismiss the appeal as it had not been properly prosecuted. He submitted, and quite correctly so, that the appeal cannot be proceeded with without a proper record being before this Court. That is trite.

When Mr Kristafor was asked what the State's response was to Mr Mdlalana's request that the matter be postponed for a further period of time to enable to him to attempt to take further steps to ensure that the record was correct, Mr Kristafor then indicated that he did not have any objection to this.

The problem that this Court is confronted with, is that it is faced with a record of appeal which is clearly incomplete. How crucial the particular evidence is in relation to this Court being able to determine the appeal is at this stage regrettably a matter of speculation. I assume that, to a certain extent, that evidence is crucial. On the other hand the evidence may be of such a nature that it does not assist appellant no. 2 in any way whatsoever and has broader implications insofar as the appeal is concerned. Whatever the position, it would not be correct or proper for this Court to hear the appeal in the absence of that portion of the record.

Having said that the further problem that has arisen, and that compounds the situation, is that this Court is unable to determine what the precise reason is for the inability to locate the missing cassette. This Court has also been deprived of sufficient information to enable it to determine where the fault lies in that regard. Further there is a paucity of information to enable this Court to establish why the record cannot be reconstructed if the cassette cannot be found. It is self-evident from the affidavit of Mr Mdlalana that whilst he may have spoken to certain individuals those conversations appear to have been of somewhat of a general nature. It appears to me that the conversations related generally to what was to be done insofar as the record was concerned. The specific issue of what actually had to take place in the circumstances, it

appears from the affidavit, was never addressed. Indeed Mr Mdlalana was at a loss tc explain to this Court precisely what had taken place. When the question was put to him whether he had put the Clerk of the Court to terms, Mr Mdlalana had, at first, expressed the view that he did not understand what was meant by that. When this was clarified he said that he had not specifically put the Clerk of the Court to terms. I do not at this stage want to go into the issue of determining whether what has been conveyed in the affidavit is absolutely correct or not. Suffice to say that in the absence of an affidavit from the Clerk of the Court as to what the precise position is and what has developed it is difficult, and in fact impossible, to decide whether the cassette is really missing, whether adequate steps have been taken to locate it, whether those steps are such that any further search would not reveal where the cassette is.

Similarly, insofar as the presiding Regional Magistrate is concerned there is nothing before this Court to indicate whether he is able, either from contemporaneous notes that he kept or from his memory, to assist in reconstructing the record. Whilst Mr Mdlalana held a general conversation with him I am afraid it is not specific enough for us to be able to determine that the magistrate is not able to assist in any manner whatsoever.

Then the attorney who represented the accused at the trial in the Court *a quo* has also not furnished an affidavit to set out why he cannot assist with the reconstruction of the record. Mr Mdlalana claims that he says he did not keep any notes. I find this strange. It is difficult for me to understand how an attorney can conduct a trial and defend three individuals without having any notes in regard to what transpired at the

trial. Surely there must be some notes, no matter how cursory they may be and no matter how cryptic they may be, that he must have kept in respect of his cross-examination and in relation to the evidence-in-chief and, in this case, particularly the evidence-in-chief. I have difficulty in accepting that he simply says he cannot assist.

There is also the question of the interpreter who was present at the trial. We have similarly not been furnished with an affidavit from the interpreter to indicate whether he or she is able to assist in any manner whatsoever. There are possibly other individuals who in one way or another may have been able to assist.

Mr Mdlalana was asked whether he had looked at the authorities in terms of which the Courts have expressed themselves clearly over a period of time as to what is required to be done where portion of the record is missing and where it has to be reconstructed. He was specifically asked to comment on the case of **S v NTANTISO AND OTHERS** 1997 (2) SACR 302. Mr Mdlalana's immediate response was to say that that matter was distinguishable from the present one before us. Indeed he went so far as to say that the problem confronting him in terms of the record in respect of the appeal before us was unique. That was an extremely bold submission to make, let me say. My understanding of the **NTANTISO** case and my reading of the record in this appeal does not lead me to the conclusion that the problem which the appellants are confronted with in terms of the record is by any means unique. Indeed whilst the facts of the **NTANTISO** case are obviously not on par with the present appeal, the question of what needs to be done in reconstructing a record is adequately set out in **NTANTISO**'s case. In addition, the learned Judge MPATI J (as he then was) has referred to

a number of other cases which also adequately deal with the reconstruction of a record. I must regrettably, and with the greatest respect, express my concern at what I said was a bold submission made by Mr Mdlalana. On second thoughts it appears to me, and I say this with the greatest respect, a cavalier submission to have made. It appears to me that Mr Mdlalana may either not have grasped the ratio in the **NTANTISO** case or may possibly be referring to another case. To me the ratio in **NTANTISO**'s case is eminently clear. I fail to see how anyone who reads that case could be left in any doubt as to what is required in terms of reconstructing a portion of a record that is missing.

Mr Mdlalana has now sought to persuade us to grant a further postponement so that he may now take further steps, and as I understand it, to file affidavits to persuade the Court either that the record cannot be reconstructed or, and this is pure speculation, to provide the reconstructed portion of the record. I cannot find any basis upon which to accede to this request. The appellants, and the attorneys of record of the appellants, have had ample time to do or take the necessary steps to ensure that the record is properly completed or reconstructed. It brings the administration of justice into disrepute when matters that have to be attended to timeously are allowed to drag on indefinitely. It cannot be expected of a Court to simply accede to every request for a postponement. The fact that the State does not oppose it does not necessarily mean that the Court should grant a postponement. The Court is required to apply its mind to the facts and to exercise its discretion judicially whether in particular circumstances a postponement should be granted or not.

In my view the facts in this matter do not support the contention

that a postponement should be granted. The matter was specifically postponed on 7 February 2003 for that purpose and again on 2 May 2003. Thus far nothing has been done. It is unfortunate that the appellants are the ones who will suffer as a result of this. They, however, have recourse, in one way or another, for what may follow as a result of the Court's decision in so far as the further prosecution of this matter is concerned. Since it is evident that the record is incomplete and this Court cannot deal with the appeal, and since it is equally evident that the steps taken thus far to rectify the record or to obtain the missing portion have been wholly inadequate, this Court refuses to postpone the matter any further.

In the result the appeal is struck from the roll.

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Y EBRAHIM

JUDGE BISHO HIGH COURT

I agree

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G BLOEM

ACTING JUDGE, BISHO HIGH COURT