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

Case No: AR107/14

In the matter between:

XOLANI JOEL CHALA	First Appellant
SKHUMBUZO JALI	Second Respondent
MPHATHI SIYABONGA MANJANJA	Third Respondent
PHUMELELE SQEBHENZANA BANGILIZWE	Fourth Respondent

and

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL	First Respondent
MR N. E. CHILI N.O.	Second Respondent

JUDGMENT

Vahed J (Ndamase AJ concurring):

[1] The crisp question in this review is whether a regional magistrate, when trying an accused on a charge of murder, commits a fatal irregularity when he or she fails to invoke the provisions of s 93*ter* of the Magistrates Court Act, 1944. The applicants allege that that question must be answered in the affirmative and that accordingly their trial presided over by the second respondent, when he failed to invoke that provision, was visited with a fatal irregularity requiring the entire proceedings to be vitiated.

[2] The facts are these. The second respondent was an acting regional magistrate for the division of KwaZulu-Natal and stationed at Verulam when the applicants and others were arraigned before him on three counts. The first count was that of murder read with s 51 and schedule 2 of Act 105 of 1997, the second was of attempted murder and so was the third. A fourth count was preferred against one of other co-accused but that count is not relevant for the present proceedings. The applicants and their co-accused were legally represented. The trial commenced on 10 October 2011 with the charges being put to all of the accused, including the applicants. It is common cause that no assessors were appointed to sit with the second respondent and it is also common cause that the second respondent did not, at all, deal with the provisions of s93*ter* of the Magistrates Court Act, 1944. The applicants were duly convicted and, on 19 April 2012, were each sentenced to serve a term of 22 years imprisonment on count one, a term of 12 years imprisonment on count two and a term of six years imprisonment on count three. All of the applicants are currently serving those sentences at the Westville Correctional Services Centre in Durban. At the conclusion of the proceedings before the second respondent an application for leave to appeal against conviction was refused but one directed at the sentences imposed was granted. After the Registrar had set that appeal down for hearing, and on the advice of counsel, the applicants withdrew that appeal and launched the current application for a review of the proceedings that unfolded before the second respondent. Much of that brief factual background is common cause.

[3] In the current review application the applicants seek an order reviewing and setting aside the entire proceedings presided over by the second respondent. That application is opposed by the Director of Public Prosecution for KwaZulu-Natal, the first respondent. As the application turns purely on a point of law, the first respondent did not deliver any answering affidavits but delivered heads of argument dealing with the point of law involved.

[4] Section 93*ter* of the Magistrates Court Act, 1944 provides as follows:-

> **"93*ter* Magistrate may be assisted by assessors**
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> (1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-
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> *(a)* before any evidence has been led; or
>
> *(b)* in considering a community-based punishment in respect of any person who has been convicted of any offence,
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> summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.
>
> (2) *(a)* In considering whether summoning assessors under subsection (1) would be expedient for the administration of justice, the judicial officer shall take into account-
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> (i) the cultural and social environment from which the accused originates;
>
> (ii) the educational background of the accused;

(iii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;

(iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;

(v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors,

and he may question the accused in relation to the matters referred to in this paragraph.

(b) For the purposes of subsection (1) *(b)* a community-based punishment means-

(i) correctional supervision as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);

(ii) a punishment contemplated in section 297 (1) *(a)* (i) *(cc)* of the Criminal Procedure Act, 1977; or

(iii) a punishment contemplated in section 297 (1) *(b)* or (4) of the Criminal Procedure Act, 1977, and where the performance of community service as referred to in the said section 297 (1) *(a)* (i) *(cc)*, is a condition for the suspension.

(3) Before the trial or the imposition of punishment, as the case may be, the said judicial officer shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict or a considered opinion, as the case may be, according to the evidence upon the issues to be tried or regarding the punishment, as the case may be, and thereupon he or they shall be a member or members of the court subject to the following provisions:

(a) Any matter of law arising for decision at such trial, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a voice in any such decision;

(b) the presiding judicial officer may adjourn the argument upon any such matter or question as is mentioned in paragraph *(a)* and may sit alone for the hearing of such argument and the decision of such matter or

question;

(c) whenever the said judicial officer shall give a decision in terms of paragraph *(a)* he shall give his reasons for that decision;

(d) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such judicial officer shall be the decision or finding of the court if there is a difference of opinion;

(e) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph *(d)*;

(f) in the event of a conviction the question of the punishment to be inflicted shall, except in a case contemplated in subsection (1) *(b)*, be deemed, for the purposes of paragraph *(a)*, to be a question of law.

(4) If any such assessor is not a person employed in a full-time capacity in the service of the State he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor.

(5) Every assessor shall, upon registration on the roll of assessors referred to in subsection (1), in writing take an oath or make an affirmation subscribed by him or her before the magistrate of the district concerned in the form set out below, namely-

'I ..... (full name) do hereby swear/solemnly affirm that whenever I may be called upon to perform the functions of an assessor in terms of section 93*ter* of the Magistrates' Courts Act, 1944, I shall to the best of my ability make a considered finding or decision, or give a considered opinion, as the case may be, according to the evidence tendered in the matter.'.

(6) to (9) inclusive ..... ***(not yet in operation)***

(10) *(a)* A judicial officer who is assisted by an assessor may, on application by the prosecutor or the accused person, order the recusal of the assessor from the proceedings if the judicial officer is satisfied that-

(i) the assessor has a personal interest in the proceedings concerned;

(ii) there are reasonable grounds for believing that there is likely to be a conflict of interests as a result of the assessor's participation in the proceedings concerned; or

(iii) there are reasonable grounds for believing that there is a likelihood of bias on the part of the assessor.

(b) An assessor may recuse himself or herself from the proceedings for the reasons contemplated in paragraph *(a)*.

(c) The prosecutor and the accused person shall-

(i) before the recusal of an assessor is ordered in terms of paragraph *(a)*; or

(ii) in so far as it is practicable, before the recusal of an assessor in terms of paragraph *(b)*,

be given an opportunity to address arguments to the judicial officer on the desirability of such recusal.

(d) The assessor concerned shall be given an opportunity to respond to any arguments referred to in paragraph *(c)*, and the judicial officer may put such questions regarding the matter to the assessor as he or she may deem fit.

(e) The judicial officer shall give reasons for an order referred to in paragraph *(a)*.

(11) *(a)* If an assessor-

(i) dies;

(ii) in the opinion of the presiding officer becomes unable to act as an assessor;

(iii) is for any reason absent; or

(iv) has been ordered to recuse himself or herself or has recused himself or herself in terms of subsection (10),

at any stage before the completion of the proceedings concerned, the presiding judicial officer may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor-

(aa) direct that the proceedings continue before the remaining member or members of the court;

(bb) direct that the proceedings start afresh; or

(cc) in the circumstances contemplated in subparagraph (iii), postpone the proceedings in order to obtain the assessor's presence:

Provided that if the accused person has legal representation and the prosecutor and the accused person consent thereto, the proceedings shall, in the circumstances contemplated in subparagraphs (i), (ii) or (iv), continue before the remaining member or members of the court.

(b) If, at proceedings which are continued in terms of this subsection, the judicial officer is assisted by the remaining assessor, the finding or decision of the judicial officer shall, in respect of any matter where there is a difference of opinion between the judicial officer and the assessor, be the finding or decision of the court.

(c) The judicial officer shall give reasons for any direction referred to in paragraph *(a)*, and for any finding or decision referred to in paragraph *(b)*."

[5] The section is clearly peremptory in its formulation requiring assessors to sit with a regional magistrate when dealing with a charge of murder except when an accused, after explanation from a regional magistrate, elects for the proceedings to unfold without assessors. In that event the presiding regional magistrate nevertheless retains a discretion as to whether to summon one or two assessors to sit with him or her.

[6] The section has received judicial attention in a number of cases. At this early stage I mention two, what may be termed, leading cases. In this province in *S v Naicker* 2008 (2) SACR 54 (N) the full bench, *per* Msimang J, Ngubane AJ concurring, held that although non-compliance with the peremptory terms of s 93*ter*(1) amounts to an irregularity, it does not necessarily follow that it amounts to a failure of justice and an assessment is nevertheless required to discover the impact of the irregularity on the

integrity of the proceedings. In the South Gauteng Court a Full Bench in *S v Du Plessis* 2012 (2) SACR 247 (GSJ) critically analysed a number of the cases dealing with s 93*ter*, including *Naicker*, and concluded that *Naicker* was wrongly decided and held that the irregularity was so fundamental that it constituted a failure of justice vitiating the entire proceedings.

[7] This court is bound by *Naicker* unless it concludes that the decision in *Naicker* was clearly wrong and not to be followed henceforth. To do so compels me to look at a number of cases that have had occasion to consider the import of s93*ter*. Where necessary I prefer to quote verbatim from the case concerned (and some extracts may appear to be unduly lengthy) rather than attempt what may later turn out to be an inadequate or imperfect summary.

[8] In *S v Gambushe* 1997 (1) SACR 638 (N) the appellant was convicted in a regional court on two counts of murder. The trial unfolded before a regional magistrate who, in compliance with s 93*ter*(1), appointed two assessors to sit with him. The appellant was duly convicted. He appealed to the Full Bench in this Division (Hurt J and Thirion J). The record revealed that the appellant was convicted on the evidence of a single witness whose evidence, in the opinion of the regional magistrate, was not sufficient. That evidence nevertheless found favour with the two assessors who presided with the regional magistrate and accordingly their view, as the majority view of the court, held sway. On appeal to the Full Bench Hurt J, in the course of his judgment, dealt with a passage from the magistrate's judgment where he explained his view and

how and why it differed from that of the two assessors. Hurt J then went on to discuss the problem thus:

> "It is apparent from the above passage that the learned magistrate was effectively distinguishing between his finding that the State's evidence fell short of establishing the appellant's guilt beyond reasonable doubt and the assessors' view, which might possibly have been based on a balance of probability. It seems that, on any reading of the evidence, the learned magistrate's approach was the correct one. But the appeal raises some important questions as to the procedure in trials in which lay assessors are involved, and I consider it apposite, in this case, to comment on certain aspects of the procedure adopted by the court *a quo*. These comments are not intended as a criticism of the court or of the procedure which it adopted, but there are certain aspects of the record and the judgment which have given us some difficulty as a Court of Appeal and it seems that some comment on the difficulties which the provisions of s 93*ter* appear to have generated would not be out of place.
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> Section 93*ter*(2)*(a)* of the Magistrates' Courts Act contains the following provisions in regard to the selection of assessors:
>
> 'In considering whether summoning assessors under ss (1) would be expedient for the administration of justice, the judicial officer shall take into account -
>
> (i) the cultural and social environment from which the accused originates;
>
> (ii) the educational background of the accused;
>
> (ii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;
>
> (iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;
>
> (v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors,

and he may question the accused in relation to the matters referred to in this paragraph.'

As I understand the object of these provisions, it was to bridge what was conceived to be the cultural gap between the magistrates, on the one hand, and the large number of intellectually unsophisticated and uneducated accused persons who frequently came to trial before them, on the other. What was contemplated was that the presence of the assessors would make the trial of the accused more of a 'trial by peers' and constitute some protection against the conduct or reactions of the witnesses and the accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong. In a limited sense, then, the assessors were intended to give the magistrate the benefit of their expertise and experience of the community from which the accused comes and of its communal values and standards, which might often explain conduct or reactions which a stranger to that community might regard as doubtful or suspicious.

However, s 93*ter*(3)*(d)* provides that, upon all matters of fact, the decision or finding of the majority of the members of the court shall be the finding of the court. It follows that, apart from affording the presiding officer some assistance in matters of custom, the assessors are required to play an active, and possibly decisive, role in the analysis of the evidence which is presented to the court and in that context they constitute a sort of 'mini jury'. In considering the consequences of this function, I think it is fundamentally important to distinguish between assessors appointed under s 93*ter* and those who sit in the Supreme Court under the provisions of s 145 of the Criminal Procedure Act 51 of 1977. Section 145(1)*(b)* states that:

'An assessor for the purposes of this section means a person who, in the opinion of the Judge who presides at the trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.'

It is a matter of common experience in the Supreme Court that, save in cases where there may be questions of fact involving specialist technical expertise, the assessors who sit with a Judge in criminal trials are invariably people who have substantial

previous experience in criminal procedure and in the science of evaluation of evidence. Thus when a question arises, for instance, on the application of a cautionary rule to the evidence of a witness, a Court of Appeal can assume, with a reasonable degree of confidence, that all three members of the Court of first instance applied the proper approach to the evidence of that witness. The same considerations clearly do not apply to the situation where assessors sit with a magistrate under the provisions of s 93*ter*. Since the provisions of s 93*ter* relate directly to procedure in criminal cases and are accordingly inextricably interwoven with those of Act 51 of 1977, it is, in my view, somewhat unfortunate that the Legislator has chosen to use the word 'assessor' to designate the people co-opted in terms of s 93*ter*.

As I understand the background to this amendment to the Act concerned, it was contemplated that the assessors would be drawn from local 'pools' of community members who are regarded as having some social and 'community' status. There is no selection criterion based on legal or procedural knowledge or experience or expertise. Although their experience as members of the community may be of considerable assistance in the enquiry pertaining to sentence of an accused person, it is by no means clear that, in the average situation, they will be able to give the presiding officer any real assistance in reaching a decision as to the guilt or innocence of an accused person. Hopefully I am being unduly pessimistic in this regard, but I am compelled to say that the particular case with which this appeal is concerned gives me no encouragement whatsoever. The material aspects that we, as Judges of appeal, are unable to ascertain from this record are the following:

(a) whether certain of the comments which are made in the body of the judgment (ie in the summary of the evidence) reflect the unanimous view of the triumvirate or whether they were the opinions of the presiding officer only;

(b) whether, and in precisely what terms, the cautionary rules relating to evidence by a single witness and relating to evidence by accomplices were explained to the assessors; and

(c) whether there were any features, other than the fact that Mavimbela reported the commission of the offence to the police, which persuaded the assessors to the view that the appellant was guilty.

The above is possibly not an exhaustive list of the aspects upon which the Appeal Court may have required more data than appears from the record, but it demonstrates what I consider will have to become a feature of trials in which assessors sit to decide the merits of a prosecution as opposed to those in which they merely assist the court in questions of sentence. It seems to me that the 'tuition' or directions which the presiding magistrate will, perforce, have to give his assessors, preparatory to their analysis of the evidence at the end of the case, will have to be part of the trial record, in much the same way as were a Judge's directions to the jury. (This notwithstanding the remarks of Schreiner JA in *R v Huebsch* 1953 (2) SA 561 (A) at 564-5.) Thus, in a case (such as the one now under consideration) involving a single witness for the State, the magistrate will have to place on record his instructions to the assessors as to how they are to approach the State evidence. Similar considerations would apply to the evidence of accomplices, the evidence of complainants in sexual cases etc. Furthermore it is not sufficient simply to state the rule. The presiding officer will have to inform his assessors of the reason why the rule is in place. Just as the Judge's summing up in a jury trial was regarded as a vital aspect on appeal, so, in my view, will the record of what was said by the presiding officer to the lay assessors be in appeals from the regional court where assessors have sat. Secondly, as in all cases where a judicial officer sits with assessors, it will be necessary for the judgment to reflect clearly whether the views expressed as to the acceptability of each material aspect of the evidence are the unanimous views of the members of the court. (See *S v Masuku and Others* 1985 (3) SA 908 (A) at 912.) Section 93*ter*(3)*(e)* of Act 32 of 1944 stipulates that the court must give reasons for its decision or finding. This requirement is in virtually identical terms to the provisions of ss 146*(b)* and *(c)* of Act 51 of 1977. What was said in *S v Masuku (supra*) at 911-12 about recording the findings of the trial Court and any reasons for dissent by any member of the Court applies with equal force to the finding of any court constituted in terms of s 93*ter*. (See also in this regard *R v Bellingham* 1955 (2) SA 566 (A) at 570; *R v Tazwinga* 1968 (2) SA 590 (RA) at 592; *S v Kalogoropoulos* 1993 (1) SACR 12 (A) at 16-17.) Thirdly, where an assessor

has special knowledge of some custom or habit peculiar to the community from which the witness or the accused comes, which may affect his conclusion as to the facts, he should inform the court of this knowledge and the existence or otherwise of the custom (and, of course, its effect on the assessment of the evidence) can then be properly aired in evidence and form part of the record in the trial.

I am aware that to require a magistrate, as part of the record of proceedings in his court, to 'instruct' his assessors on all the niceties of the law of evidence which may arise in the course of a trial and which may affect their approach to the factual material in that evidence, will constitute a substantial additional burden, but I do not think that there is a reliable or workable alternative. It is certainly not feasible nor in the interests of the proper administration of justice that 'assessors' who are appointed under s 93*ter* should, as triers of fact, be presumed to have the same status and capabilities as the assessors who are appointed under the provisions of s 145 of Act 51 of 1977. In this particular instance, the main aberration on the part of the assessors is fairly apparent from the evidence itself, but there are a myriad of possible instances where a failure to grasp the fundamentals of analysis of evidence may lead an assessor into error which will not be easily discernible from the record or from the judgment. In such cases the danger of a miscarriage of justice will be ever present and the only means to avoid it will be to ensure that <u>all</u> the relevant material is on the record for the Appeal Court to see."

[9] In my respectful view Hurt J's pessimism and aspects of his analysis of the section are unfortunate.

[10] In *S v Khambule* 1999 (2) SACR 365 (O) the court held that the section requires positive conduct on the part of the accused, namely a 'request' to that effect before the trial may proceed without assessors, and it is therefore essential that the provisions of the section must be brought to the attention of the defence, which fact, including the

accused's 'request' in response thereto, must, if the regional magistrate sits without assessors in a murder trial, appear from the record of the proceedings.

[11] In *S v Ntsie* (CA66/04) [2004] ZANWAC 21 (16 September 2004) the Boputhaswana Provincial Division held that a failure to invoke the provisions of s 93*ter*, on a consideration of ordinary constitutional principles, did not *per se* vitiate the proceedings and adopted an approach which indicated that it was nevertheless necessary to conduct an analysis of the proceedings themselves to decide whether and accused person's constitutional right to a fair trial had been infringed. The court however did not have regard to or consider either *Gambushe* or *Khambule*. In addition, the considerations dealt with in *Du Plessis* (which will be discussed below) did not feature during the court's evaluation of the problem.

[12] In *S v Mitshama and Another* 2000 (2) SACR 181 (W) it was held that the thinking that the overriding reason for having assessors was where different cultures were an issue was not correct. In that case the court held that the magistrate in the court below was mistaken in overlooking other equally important considerations relating to the appointment of assessors. The following extract from *Mitshama* is instructive:

> "The magistrate seems to think that the overriding reasons for having assessors is where different cultures are an issue. I am bound to say that the magistrate is mistaken in overlooking other considerations equally important that should be taken into account. To have assessors, members of the community, is to some extent to have regard to the traditional part played by the members of the community in the trial of persons accused of criminal offences. This object is pursued in other

jurisdictions by the institution of the jury, as it used to be in this country.

And there is at least one other good reason why the Legislature thought fit to prescribe what it did as to assessors. A single Judge sitting in a criminal trial may, and probably will, benefit by having with him as members of the Court persons with whom he may discuss difficulties which arise during the trial and who may take part of the responsibility of decisions which may bear heavily upon accused persons. That is why in the High Court, in matters where a life sentence or long sentence of imprisonment may follow a conviction, Judges invariably have assessors to assist them. In my view, the failure by the magistrate even to give consideration to having assessors constitutes a serious irregularity.

I hold that there were the following irregularities in this matter:

1. The failure of the record to reflect that one of the accused was advised of his right to legal representation.

2. The failure of the record to reflect that the accused were informed of the desirability of their having legal representation and that representation at State expense was available to them.

3. The gratuitous enquiry of the accused as to whether they wished to dispense with assessors.

4. The failure by the magistrate to exercise a discretion nevertheless to summon one or more assessors after the accused had agreed to dispense with assessors."

[13] In *S v Maphanga* 2001 (2) SACR 371 (W) the court was dealing with a matter submitted on review by a regional magistrate who was of the opinion that the two assessors appointed in the matter before him would be of no assistance because,

amongst other things, "…hulle ken nie die reg nie". Labe J analysed *Gambushe* in some detail and said:

> "[8] I am not as pessimistic as the learned Judge in *Gambushe's* case is as to the possibility of lay assessors being of assistance to a magistrate in arriving at a decision on conviction.
>
> [9] The essence of the complaint of the learned regional magistrate is that s 93*ter* of the Act does not work in practice. That, however, does not relieve him of the duty to act in terms thereof.
>
> [10] The starting point in the reasoning of the learned regional magistrate is that no lay-assessor will be of any assistance to him in the decision of this case or any other case for the reasons which he has set out in this memorandum from which I have quoted above.
>
> [11] *In casu* he has not shown that the assesors selected by him are not able to be of assistance to him in the trial. He has rejected them, because they do not have skills which they are, in terms of the law, not required to have.
>
> [12] Section 145(1)*(b)* of the Criminal Procedure Act 51 of 1977 provides:
>
> > *'(b)* An assessor for the purposes for this section means a person who, in the opinion of the Judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.'
>
> In contrast, s 93*ter*(1) of the Act refers to no qualifications which the lay assessors are required to have. The only requirement is that they should be persons who, in the opinion of the magistrates, may be of assistance at the trial of the case.
>
> [13] It is very clear that what the learned regional magistrate is required to do is to ascertain whether the assessors sworn in by him, taking into account the purpose for which they are appointed, may in his opinion be of assistance to him. It is to be noted that the learned regional magistrate does not have to be satisfied that the

assessors *will* be of assistance to him. It is sufficient if they *may* be of assistance to him.

[14] The discretion of the learned regional magistrate must be rationally exercised.

[15] The assessors from whom the magistrate has to choose, I suggest, will seldom be unable to be of any assistance to the magistrate. A magistrate should not be astute to find that assessors put forward to him, will not be able to be of assistance to him in arriving at a verdict in the case.

[16] The assessors should be regarded by the magistrate as being in a position analogous *mutatis mutandis* to lay jurors who also do not have to have any legal experience, but are in some jurisdictions regarded on proper instruction to be the sole arbiters of fact."

[14] The problem next featured in this Division in *S v Samigan* (KwaZulu-Natal Provincial Division Case Number AR685/2003, unreported, delivered on 30 June 2005) where Patel J (Pammenter AJ concurring) held that the failure to comply with the peremptory provisions of s 93*ter* constituted "… so fundamental an irregularity that the convictions of the appellant on the various counts cannot stand".

[15] A Full Bench in the Northern Cape Division (Lacock J and Tlaletsi J) considered the import of s 93 *ter* in *S v Titus* 2005 (2) SACR 204 (NCD) and in the course of its judgment also considered, amongst others, *Gambushe, Khambule,* and *Mitshama.* The reasoning in *Titus* was as follows:

"[5] In relation to the appointment of assessors, the record of the proceedings

reveals the following communication between the presiding officer and the appellant before charges were put:

> '*Voorsittende beampte*: Nou dan gaan die saak moet aangaan. Nou kyk u is nie, daai man met die hoed op jou kop haal af asseblief tog. As u nou nie regsverteenwoordiging het nie dan kan u aansoek doen by die hof dat die hof bystaan word deur twee assessore, dis met ander woorde twee leke persone wat die hof aanstel om by te sit as ek die moordsaak doen. As u dit verlang. Verlang jy assessore of wil u nie assessore hê nie?
> *Beskuldigde mnr A Titus*: Ek verlang Meneer.
> *Voorsittende beampte*: Ekskuus tog?
> *Beskuldigde mnr A Titus*: Ek verlang.
> *Voorsittende beampte*: Wil u hê die hof moet assessore aanstel?
> *Beskuldigde mnr A Titus*: Ja.
> *Voorsittende beampte*: Dis twee mense wat niks van die reg af weet nie, as hulle beoordeel is dat u skuldig is en ek is van oordeel dat u is nie skuldig nie, dan word u skuldig bevind as hulle so voel, dis mense wat niks van die reg af weet nie, dis mense wat nie opgelei is nie. Wil u hê dat ek twee mense aanstel om hier op die bank te kom sit by my? Dis nie mense wat vir u help nie, dis mense wat nou maar hier moet sit en luister. Lede van die publiek af.
> *Beskuldigde mnr A Titus*: Nee u edele ek gaan maar. . . .
> *Voorsittende beampte*: Wil u nie assessore hê nie?
> *Beskuldigde mnr A Titus*: Nee u edele.
> *Voorsittende beampte*: Mevrou u kan maar gou die klagte stel, ek sal hulle nou aan u oorhandig, u kan vir my sit.'

[6] Having formed a *prima facie* view that there is a possibility that the provisions of the Act may not have been properly complied with by the magistrate, we sent a communication to both counsel to prepare submissions on whether the conduct of the magistrate amounted to an irregularity and if so, what effect it may have on the proceedings. The reason being that this issue was not raised in the notice of appeal (which was prepared by the appellant personally from prison) and the heads of argument filed on behalf of the appellant and the respondent respectively.

[7] Both Mr *P J Cloete* on behalf of the appellant and Mr *J J Cloete* on behalf of the State submitted that the magistrate committed an irregularity, in that he appeared to have cornered the appellant to change his original request to have assessors appointed. They were however, of the view that the magistrate was exercising his discretion in terms of the Act, which discretion although irregularly exercised, did not amount to the appellant receiving an unfair trial. They argued that there is over-whelming evidence that supported the conviction of the appellant.

Despite our request in advance, Mr *P J Cloete* was unable to refer us to any authority on this subject, and, in my view, his concession is unfounded.

[8] In my view, the issue to be decided at this stage, is the discretion that the regional magistrate has, in trials where an accused person appears on a charge of murder; the effect of the accused's request, and whether the regional magistrate should have summoned assessors. Furthermore, should it be found that the magistrate acted irregularly, what effect would such an irregularity have on the trial as a whole.

[9] My reading of the relevant section envisages two situations. The first is that a judicial officer presiding at any trial may if he deems it expedient for the administration of justice, and before any evidence is led, summon one or two persons, who in his opinion, may be of assistance at the trial, to sit with him as assessor or assessors. In this instance, the presiding officer has a discretion to exercise based on reasons of expediency and the assistance of such person(s) at the trial. Subsection (2) lists factors which the presiding officer should take into account in the exercise of his discretion, ie in determining whether it would be expedient for the administration of justice. These are the factors listed in para [4] above.

[10] The issue whether the assessors would be of assistance to the court was considered in *S v Maphanga* 2001 (2) SACR 371 (W). The Court held as follows at 373*h-i*:

> '[13] It is very clear that what the learned regional magistrate is required to do is to ascertain whether the assessors sworn in by him, taking into account the purpose for which they are appointed, may in his opinion be of assistance to him. It is to be noted that the learned regional magistrate does not have to be satisfied that the assessors will be of assistance to him. It is sufficient if they may be of assistance to him.
>
> [14] The discretion of the learned regional magistrate must be rationally exercised.'

[11] The second situation which is, in my view, envisaged by the Act is to be found in the proviso to s *93ter*(1)*(b)*. In my understanding, it provides that, if an accused is standing trial in the court of a regional division on a charge of murder, as in this

case, the judicial officer shall at the trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors. This means that the decision to have the assessors in all cases of murder is that of an accused person, and the magistrate will only have a discretion once the decision is against having assessors. This view is further fortified by the use of the words 'shall' and 'unless' by the Legislature.

[12] It is only in instances where the accused specifically requests the magistrate that assessors should not be summoned, that the trial may be proceeded with without assessors. In that instance as well, the judicial officer should, despite the accused's request, have regard to the factors stipulated in ss (2), and question the accused in relation to those matters. If he or she is of the view that it will be expedient for the administration of justice, he or she may summon one or two persons as assessors, notwithstanding the accused's request.

[13] In *S v Khambule* 1999 (2) SACR 365 (O), the Court also interpreted the section to mean that the appointment of assessors is peremptory in murder cases, unless an accused requested that the trial should proceed in their absence. Mr *J J Cloete* sought to distinguish this case from *Khambule's* case, and argued that the conclusion reached by that Court was qualified to the facts of that case. With respect, I disagree. In *Khambule's* case, the record did not reflect that the accused or his legal representative was given an opportunity to waive the right to have assessors summoned. The magistrate's explanation was that, having circulated a *pro forma* notice to all practitioners and accused, in general, to indicate in advance in cases of murder if they would require assessors, the issue was not raised by the appellant's legal representative on the day of the trial. The Court on appeal held that the provisions are peremptory, and non-compliance therewith is not only irregular, but also constitutes a failure of justice. The Court held further that the section requires positive conduct on the part of the accused, which is a 'request' to that effect before the trial may proceed without assessors, and it is therefore essential that the provisions of the section be brought to the attention of the defence, and furthermore this fact together with the accused's request in response, must be reflected in the record of the proceedings (at 637*c* - *g*). I agree with this conclusion.

[14] In my view, the Act prescribes the manner in which a court should be constituted. Non-compliance with the peremptory provisions of how a court should be constituted in murder trials, is *per se* grossly irregular. One need not go further and check whether such an irregularity amounts to a failure of justice, or that, given the circumstances of the case and the seriousness of the offence, it will not be in the interests of justice to upset the conviction. The fact that the Legislature made it incompetent for the magistrate to preside alone under certain circumstances, cannot be made competent by the fact that there is overwhelming evidence that the appellant is guilty of the offence of which he has been convicted. This situation is different from instances analysed by Steenkamp J (as he then was) in *S v Khuzwayo* 2002 (1) SACR 24 (NC) which Mr *J J Cloete* has extensively referred this Court to. I agree with the submission that not all irregularities will lead to a failure of justice and that each case should be considered on its own facts. The nature and the degree of the irregularity should play an important role.

[15] Mr *J J Cloete* argued that the irregularity must be judged on the effect it had on the trial, and that the same evidence placed before court would still be placed before the court sitting with assessors. I am not persuaded by this submission because, assessors once appointed, form an integral part of the proceedings and do have an influence in the outcome of the case.

[16] Turning to the facts of this case it is undisputed that the appellant having been told by the magistrate that he can make an application to the court that the court be assisted by two assessors, which explanation is in itself incorrect, he nevertheless applied that assessors be appointed. His request that assessors be appointed was not taken kindly by the regional magistrate. I say this because the magistrate deemed it necessary to explain that assessors are untrained members of the public who are ignorant and will be of no assistance to the appellant. The appellant was further intimidated by an example given by the magistrate that should he (the magistrate) find that the appellant is not guilty, he will be bound by the majority decision of these untrained and ignorant people. He failed to explain to the appellant that, on the other hand, should he be of the opinion that the appellant is guilty, he will likewise be outvoted by the lay assessors, resulting in his acquittal. The magistrate failed to explain the provisions of the legislation to the appellant. He

merely expressed his views about lay assessors and, in a way, discouraged the unrepresented accused to have assessors summoned. To say in the judgment that he explained the position in detail to the appellant is in my view an overstatement. The use of lay people as assessors is a deliberate decision by the Legislature and magistrates should not be astute to conclude that they will not be of assistance to them. (See *S v Maphanga (supra*) at 373.) The object of these provisions was correctly analysed in *S v Gambushe* 1997 (1) SACR 638 (N) and the Court held as follows at 642*h* - 643*c*:

> 'As I understand the object of these provisions, it was to bridge what was conceived to be the cultural gap between the magistrates, on the one hand, and the large number of intellectually unsophisticated and uneducated accused persons who frequently came to trial before them, on the other. What was contemplated was that the presence of the assessors would make the trial of the accused more of a ''trial by peers'' and constitute some protection against the conduct or reactions of the witnesses and the accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong. In a limited sense, then, the assessors were intended to give the magistrate the benefit of their expertise and experience of the community from which the accused comes and of its communal values and standards, which might often explain conduct or reactions which a stranger to that community might regard as doubtful or suspicious.
>
> However, s 93*ter*(3)*(d)* provides that, upon all matters of fact, the decision or finding of the majority of the members of the court shall be the finding of the court. It follows that, apart from affording the presiding officer some assistance in matters of custom, the assessors are required to play an active, and possibly decisive, role in the analysis of the evidence which is presented to the court and in that context they constitute a sort of ''mini jury''. In considering the consequences of this function, I think it is fundamentally important to distinguish between assessors appointed under s 93*ter* and those who sit in the Supreme Court under the provisions of s 145 of the Criminal Procedure Act 51 of 1977.'

See also an article by M M Watney, 'Assessore in die laerhof' 1992 (55) *THRHR* at 465.

[17] In conclusion, I am of the view that the conduct of the magistrate has under the circumstances amounted to a serious irregularity which affects the entire proceedings. (See *S v Mitshama and Another* 2000 (2) SACR 181 (W) at 183 - 4.) The request that the public prosecutor should quickly put the charge to the appellant after the appellant conceded, to a leading question, that he did not require assessors was not necessary. The magistrate lost the opportunity, at least at this

> stage, to give consideration to have assessors summoned, taking into account the factors contained in ss (2). The dominant role played by the magistrate in leading the evidence of State witnesses, and calling for documentary evidence and the reminder to the public prosecutor not to forget to prove 'chain evidence' is indicative of the need for assessors to have been summoned."

[16] *Naicker*, although delivered on 16 August 2007, then followed in the July 2008 volume of the South African Criminal Law Reports. In *Naicker*, the court, taking its lead in part from *Gambushe*, placed considerable emphasis on the cultural implications of the appointment of assessors in criminal trials in the regional court, the purpose they served, and on ordinary constitutional imperatives dealing with a failure of justice.

[17] In *Naicker*, in the course of evaluating the role played by assessors in the lower courts, Msimang J said the following:

> "The central purpose of the criminal-justice system is to decide the factual question relating to the guilt or innocence of an accused person. Unlike the jury system in the Anglo-American world, the system of trial by assessors in the lower courts in South Africa has not been: '(I)n existence in several centuries and carried impressive credentials traced by many to Magna Carta.' [*Duncan v Lousiana* 391 US 145 (1968) at 151]
>
> Even when it was introduced into the statute book during 1954, [Section 93*ter* was introduced by s 3 of the Magistrates' Courts Amendment Act 14 of 19543] the utilisation thereof was subject to the approval of the Minister of Justice with: 'The practical result … that assessors are hardly ever used in these courts.' [Dirk van Zyl & Norma-May Isakow 'Assessors and Criminal Justice' (1985) 1 *SAJHR* 218 at 232]
>
> The hindrance to the system was not lost sight of in the report of the Hoexter Commission which recommended reform expressing itself as follows:

> 5.12.1.5 Approval by the Minister of Justice is a prerequisite under Section 93*ter* of the Magistrates' Courts Act, 1944, for the appointment of an assessor/assessors in criminal trials in lower courts. Obtaining such approval is a time-consuming process. Regional magistrates are experienced judicial officers. They are vested with considerable criminal jurisdiction and in the Commissioner's view the abovementioned prerequisite is unduly restrictive and the Commissioner therefore recommends that the prerequisite that the Minister of Justice approve the appointment of an assessor or assessors be done away with.

[Commission of Enquiry into the Structure and Functions of the Courts. Chairman - Mr Justice GG Hoexter Fifth and Final Report: Part A: 5.12.1.5 at 360 – 1]

When during 1991 reform ultimately eventuated, it was no longer necessary to seek ministerial approval, but it was now compulsory, in cases where the accused is being tried for the crime of murder, for a regional magistrate to summon to his or her assistance two assessors unless such an accused requests that the trial should proceed without assessors whereupon, in his discretion, the regional magistrate may summon assessors to assist him. But then those assessors need not have any experience in the administration of justice. They will only qualify if, in the opinion of a regional magistrate, they may be of assistance at the trial of the case or in the determination of a proper sentence. This amendment opened the way to lay assessors belonging to other racial groups to participate in the administration of criminal justice which hitherto had been perceived to be a preserve of predominantly white judicial officers. It is no wonder that, after having taken note of the amendment, an author of the time remarked as follows:

> kritiek wat heel dikwels teen die regstelsel in Suid-Afrika uitgespreek word, as sou dit deur die blanke lede van die gemeenskap oorheers word, . . . behoort in die groot mate deur hierdie wetgewing ondervang te word.

[MM Watney ‘Assessore in die laerhof’ (1992) 55 *THRHR* at 468]

By removing the requirement that the assessors should have experience in the administration of justice, it is evident that those assessors would not have been of real assistance to the court in reaching a decision in factual issues relating to the guilt or innocence of an accused person.”

[18] Msimang J subjected the cultural and constitutional aspects to a detailed analysis but in my respectful view, overlooked and under assessed the other important contributions that assessors make in constituting a court that is a trier of fact. Msimang J dismissed the remaining considerations in a short paragraph thus:-

> "I have perused and considered the decisions upon which Mr *Howse* relied for his submission that the irregularity is such that per se there was a failure of justice and noted that in none of them was an attempt made to establish the object and purpose for the enactment of the relevant provisions of s 93*ter*. All what these decisions appear to have done was to take note of the fact that those provisions are couched in peremptory terms and concluded that failure to comply therewith amounted to such a fundamental irregularity as to per se vitiate the entire proceedings. The same applies to an unreported decision of this division which was referred to me by Mr *Howse* on 30 July 2007 [*Samigan, supra*], to whom I am indebted for the same. On this issue it would suffice to refer to the following passage taken from a decision of the Supreme Court of Appeal:
>
> > Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should read as 'may'; etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret.
>
> [*Per* Olivier JA in *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) at 659C-E]"

[19] With respect, it seems to me that the reliance on *Weenen T L C* was misplaced. There Olivier JA was dealing with the interpretation of s 166 of the Local Authorities Ordinance 25 of 1974 (KZN) which contained the word "shall" in relation to a direction as to when rates assessments had to be published in a newspaper by a local authority.

There was no authority dealing with an interpretation of the section itself and the court below conducted an exhaustive evaluation of a number of decisions, both local and foreign, dealing with interpretation of words suggesting peremptoriness in statutory documents. It was in that context that Olivier JA made the observation referred to by Msimang J. In *Naicker* cases directly interpreting s 93*ter* were available for consideration (*Khambule*, *Titus*, *Maphanga* and *Mitshama*, amongst others) and were, in my respectful view, not deserving of mere dismissal in the terms that they were.

[20] *S v Sass* (A411/2008) [2008] ZAWCHC 279 (31 October 2008) a Full Bench of the Cape of Good Hope Provincial Division (Roux AJ and Meer J) looked at the problem and, considering amongst others *Khambule, Titus, Mitshama* and *Naicker* declined to follow *Naicker* and instead endorsed the views of the Northern Cape Division in *Titus*, concluding in accordance with that expressed in *Titus*, that assessors fulfil an important function and have considerable power. In that matter a failure to comply with the provisions of s 93*ter* resulted in the conviction and sentence of the appellant being set aside.

[21] In *S v Mokalaka* 2010 (1) SACR 88 (GNP) the appellant had been convicted in a regional court of murder, rape and robbery and sentenced to 15, 10 and 10 years imprisonment respectively. The murder was committed in circumstances distinct and different from the circumstances surrounding the rape and the robbery. On appeal the court, with reference to *Khambule, Titus* and *Naicker* reasoned that the considerations in *Khambule* and *Titus* were preferable to those in *Naicker* and held that a failure on the

part of the magistrate *a quo* to properly invoke the provisions of s 93*ter* constituted a fatal irregularity with regard to the conviction and sentence on the count of murder. The conviction for murder was set aside.

[22] As indicated above, *Du Plessis* did not consider *Naicker* to be sound law and after careful consideration, endorsed the trend set by *Khambule* and *Titus*. In *Du Plessis* C. J. Classen J (Kekana AJ concurring) said:-

> [6] A comparable set of facts arose in the case of *S v Naicker* 2008 (2) SACR 54 (N). That case was presided over by Msimang J and Ngubane AJ. In that case it was also common cause between the state and the defence that the appellant was convicted and sentenced without assessors being appointed, notwithstanding the fact that the appellant was arraigned on a charge of murder, nor was he approached by the magistrate to enquire whether or not he required assessors to be appointed. In that case it was conceded by counsel for the state that the failure constituted an irregularity. The court held at 57*i* as follows:
>
> > 'There can be no doubt that the provisions of the proviso to s 93*ter*(1)*(a)* are couched in peremptory terms and therefore that failure by the court a quo to apply the said provisions in the situation in which the requisite jurisdictional facts were present amounted to an irregularity. The issue to be determined by this court is the effect which that irregularity had on the integrity of the proceedings.'
>
> [7] With reference to the two well-known types of irregularity that one finds in criminal proceedings, [*S v* Moodie 1961 (4) SA 752 (A) at 758F-G] as set out by Holmes JA, the court came to the conclusion that such irregularity did not render the proceedings per se a failure of justice. It held that such failure fell into the first category, and that the irregularity was not so fundamental that it in fact amounted to a per se failure of justice. In this regard it was held at 61*h* as follows:
>
> > 'Having regard to the purpose and history of the system of trial by assessors in the lower courts as briefly stated above, it is my considered opinion that, despite the peremptory manner whereby the proviso to s 93*ter*(1)*(a)* has been couched, failure to

> comply therewith is not so serious and fundamental as *per se* to vitiate the proceedings. To borrow from the American nomenclature, such an irregularity may be subjected to a harmless error analysis.'

[8] The court thereafter continued with an enquiry to establish whether a reasonable court properly directing itself would inevitably have convicted in spite of the irregularity. It separated the bad from the good and considered the merits of the case, including any findings as to the credibility of witnesses. In particular the court concluded that, due to the fact that the judicial officer and the accused belonged to the same racial group, the irregularity could not have prejudiced the appellant during the trial and that no failure of justice resulted. The question arises whether this decision was correct.

[9] The learned judges in the *Naicker* case relied on an analysis of the provisions of s 93*ter*(2), which governs the considerations to be taken into account when deciding whether or not assessors would be appointed. In that regard Hurt J in *S v Gambushe* 1997 (1) SACR 638 (N) ([1997] 2 All SA 118) at 642*h* – *i* held as follows:

> 'As I understand the object of these provisions, it was to bridge what was conceived to be the cultural gap between the magistrates, on the one hand, and the large number of intellectually unsophisticated and uneducated accused persons who come to trial before them, on the other hand. What was contemplated was that the presence of the assessors would make the trial of the accused more of a 'trial by peers' and constitute some protection against the conduct or reactions of the witnesses and the accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong.'

With respect, I wish to associate myself with the interpretation of Hurt J as to the underlying need for the provisions set out in s 93*ter*(2). However, that is not the only consideration that must be taken into account when considering the effect of a failure to comply with the provisions of s 93*ter*(1).

[10] As indicated above, the proviso specifically enjoins in peremptory terms (shall) a magistrate hearing a murder case to appoint assessors, unless the necessity to do so is waived by the particular accused. The import of this proviso, to my mind, is that a court does not have discretion to do without assessors in a murder trial in the

lower courts, unless a communication with the accused or his legal representative indicates that the court is relieved of the duty to appoint such assessors.

[11] In my view, there is a very good reason why the legislature has couched the provision in such terms. Assessors in a murder trial in the lower courts are not only there to assist the magistrate in bridging any cultural or educational gaps that may exist between the court and the accused. In terms of ss (3) assessors are also members of the court entitled to decide issues of fact and 'give a true verdict'. An accused in a murder trial in the magistrates' courts must therefore have the opportunity to make an informed election as to whether he wants the decision-making forum to consist of one individual or more, irrespective of whether or not cultural differences may exist.

[12] I pause to mention at this stage that the history of the appointment of assessors came considerably to the fore after the abolition of jury trials. In South Africa up until 1969 jury trials were permitted at the election of an accused. Jury trials were allowed in order to cater for the needs of accused persons if they desired to be tried by their peers. Once jury trials were abolished, alternative measures were necessary to cater for this need. The appointment of assessors became the only way in which any semblance of being tried by peers could be established.

[13] Problems usually arose when a member of the presiding forum died or became incapable of continuing further with the trial. The need to overcome this deficiency was already exposed in 1954 in the case of *R v Price* 1955 (1) SA 219 (A). In that case it was obligatory, due to the demand of certain statutory requirements, to appoint two assessors. One of the assessors died during the course of the trial. The defence made an application for an order that the case should proceed before the judge and the remaining assessor. This application was supported by both counsel for the Crown and the defence, and so the judge granted the application.

[14] Subsequently, after conviction and sentence, one of the accused appealed by way of a special entry, raising the question whether the court a quo had power to order the trial to continue in the absence of one of two appointed assessors, despite the agreement of counsel for the state and the defence in that regard. On appeal the

court held that after the death of the first assessor the court a quo was not properly constituted and consequently its verdict as well as the sentence were irregularities which could not be regularised by the agreement of an accused person. Greenberg JA stated the following at 223E – G:

> 'In *Rex v Gluck* 1923 AD 149, the Court appears to have considered it almost axiomatic that, in a Court constituting of a president and two assessors, who were members of the Court, the two assessors in the absence of the president, did not form a quorum and that their decision was not one of a Court properly constituted; it is also clear from *Green v Fitzgerald & Others* 1914 AD 652, that where a certain number of Judges is necessary to form a quorum, the Court is not properly constituted if its number falls short of that quorum, even though that number would be enough to constitute a majority of the Court. In the present case, the quorum clearly was three members . . . and the fact that, in such a quorum, the decision of two would be an effective majority does not cure the deficiency in its quorum.'

Greenberg JA concluded at 224C – E as follows:

> '*Prima facie* when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal should take part in the consideration of the decision. In *Ras Behari Lal and Others v The King Emperor,* 150 LTR 3, which was followed in this Court in *Rex v Silber* 1940 AD 187, the Privy Council set aside the verdict of a jury because one of its members did not understand the language in which the proceedings or a material part of them were conducted. Lord Atkin said that the Board thought
>
> > "that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection afforded to him by law and that the result of the trial in the present case was a clear miscarriage of justice".
>
> '(See also *Silber's* case at pp 193 to 194). What was denied to the accused in these cases was his right to a consideration of his case by every member of the fact-finding tribunal.'

[15] The importance of *R v Price* is that it was decided on facts where two assessors were essential for a particular trial, much as in the present case where the Act demands the appointment of two assessors in the case of a murder trial. *R v Price* has been followed in *S v Malindi and Others* 1990 (1) SA 962 (A) where Corbett CJ at 970G had the following to say:

> 'An assessor appointed in terms of s 145 [of the Criminal Procedure Act 51 of 1977] is a member of the Court and participates in all decisions of the Court on questions of

> facts. Where the Judge sits with two assessors the decision of the majority (on factual questions) constitutes the decision of the Court. Where, on the other hand, the Judge sits with only one assessor, then in the event of a difference of opinion the decision of the Judge prevails (s 145(4)). An accused person has a right to have his case considered by every member of the fact-finding tribunal (see *R v Price* 1955 (1) SA 219 (A) at 224D – E) and it is especially important that this should be so in cases covered by the proviso to s 145(2).'

[16] The proviso referred to above in s 145(2) dealt with the imposition of the death sentence in cases of murder trials, which was subsequently deleted after the Constitutional Court declared the death sentence unconstitutional. Be that as it may, it is still important to an accused that assessors be part of the decision-making and fact-finding process in a lower court where he/she is subjected to a murder trial.

[17] In the lower courts the highest jurisdiction afforded to a regional court is in fact to hear a murder trial and one can therefore understand why an accused would want to have a fact-finding tribunal consisting of more than one presiding officer. The problem that I have with *Naicker*'s case aforesaid is that the learned judges never considered the importance of an accused's right to have assessors as part of the fact-finding process. It seems to me as if the court restricted itself to considering whether a failure of justice occurred based purely on a consideration of the fact that the language and racial group of the court and the accused were similar. That, to my mind, is not sufficient to decide whether or not a miscarriage of justice took place.

[18] In the present case before us there is no indication in the record, that the accused was ever asked whether he wanted to deny himself the right to have a fact-finding tribunal consisting of more than one presiding officer. That being the case, I am of the view that the Appeal Court cases of *R v Price* and *S v Malindi* constitute authority for the proposition that failure to comply with s 93*ter*(1) results in a per se irregularity which cannot be waived or condoned by either the accused or his legal representative, and thus constitutes a failure of justice.

[19] It would seem to me that the weight of authority is in line with the aforesaid conclusion. A similar conclusion was arrived at by King and Farlam J in *S v Daniels and Another* 1997 (2) SACR 531 (C). In that case the trial was commenced before a magistrate and two assessors. One of the assessors then absconded. The

magistrate continued with the trial with one assessor. Farlam J held at 532I – J as follows:

> 'I cannot agree with the magistrate's contention that the accused were not prejudiced because there was only one assessor, with the result that the magistrate's finding on the facts would in any event have been the finding of the court. This overlooks the fact that the assessor, if she had disagreed with the magistrate on the facts, might have been able to persuade the magistrate that her view was correct.'

[20] In that matter the accused also consented to the defective procedure of continuing with one assessor only. Farlam J at 533D also rejected the contention that such a waiver was valid and stated that such consent did not cure the defect in the proceedings. As a result, the convictions and sentences were set aside on the basis that a miscarriage of justice occurred.

[21] We, therefore, are of the view that the decision in *S v Naicker* was wrongly decided. The court in that case never took cognisance of the Appeal Court cases laying down the importance of a right to have a fact-finding tribunal consisting of more than one member. This requirement is independent of any benefit contemplated in ss (3)."

[23] In *S v Malatji* (A259/10) [2013] ZAGPPHC 105 (18 April 2013) a Full Bench of the North Gauteng High Court, noting the view taken in *Naicker*, preferred the approach articulated in *Du Plessis* and held that a failure to comply with s 93*ter* constituted a fatal irregularity.

[24] Those then are the more important cases that I have been able to find that deal with the problem facing regional courts in the application of s 93 *ter* of the Magistrates Court Act, 1944.

[25] Two things are immediately clear from what I have set out above. Apart from the Boputhaswana Provincial Division which, as I have observed, looked at the problem from a perspective of general constitutional principle but ignored the discussion in *Gambushe* and *Khambule*, the overwhelming sentiment in the other divisions of the High Court is to treat a failure to properly invoke s 93*ter* as being a fatal irregularity vitiating the entire trial. Secondly, *Naicker* did not give proper consideration to the other important aspects that assessors contribute to when sitting in a court trying factual issues.

[26] It seems to me largely for the reasons articulated in *Du Plessis*, with which I respectfully associate myself and which I gratefully adopt here, that *Naicker* was wrong when it did not follow *Samigan* in this division and was also wrong when it declined to follow, without careful consideration, *Titus*, *Mitshama* and *Khambule*. To my mind the decision in *Samigan* was correct and *Naicker* was clearly wrong.

[27] I am of the view that *Naicker*, being clearly wrong, does not constitute good law and should no longer be followed in this division. A failure to properly invoke the provisions of s 93*ter* will for the reasons discussed above always constitute a fatal irregularity resulting in the proceedings being set aside.

[28] I am of the view also that to overcome the problems as highlighted by these cases it should always appear from the record of proceedings in cases where s 93*ter* is required to be invoked that a proper explanation is given by the magistrate to accused

persons of the choice they have in the appointment of assessors together with a brief exposition of the import of that choice and as to what is required of them. The record should also reflect, after having given such explanation and requesting such response from accused persons, in cases where they elect not to have assessors, that the magistrate nevertheless still considered whether such course was advisable in the particular case before him or her. All of this should appear on the record.

[29] In the present matter the application papers also reveal that it was initially thought fit to challenge the proceedings before the second respondent in certain other respects but all of those were abandoned and in argument Mr Mvune, who appeared for the applicants, expressly confined the applicants' case only and purely to the s 93*ter* problem. In that regard it remains for me to express my extreme disappointment with the lack of preparation on the part of the applicants' attorney and counsel. Their heads of argument were extremely terse and notably referred neither to *Naicker* nor to *Du Plessis*. During argument, the applicants' counsel could offer no assistance to the court in deciding the question. This Court is heavily burdened with a tremendous workload of appeals and reviews from the lower courts, each such matter requiring the attention of two judges. In those circumstances the courts rely, for the efficient functioning of the system and the proper administration of justice, on the honest and earnest industry of the practitioners that appear in such appeals and reviews. In the present matter it was inexcusable for the applicants' legal representatives not to have referred to and prepared argument on the two "leading cases" on the legal point in issue. That failure becomes even more bizarre and inexplicable when they have no excuse for failing to at

least prepare argument dealing with those two cases after their attention was pertinently drawn to them in the respondent's heads of argument.

[30] The offences in respect of which the applicants were convicted all arose and occurred during the unfolding of a single course of events. The evidence in respect of the murder count was directly connected and wrapped up in the evidence relating to the other two counts. In the result it is proper that all the convictions and sentences be set aside. In that regard I would urge the first respondent to ensure that the prosecution is pursued afresh before a properly constituted court.

[31] In the result the application succeeds and I make the following order:-

> **The proceedings before the second respondent in the Regional Court for the Regional Division of KwaZulu-Natal sitting at Verulam under case number VRC87/2011 and the convictions of the applicants on 22 March 2012 and the sentences imposed on them on 19 April 2012 are all reviewed and set aside.**

_____
Vahed J

_____
Ndamase AJ

Date of Hearing	:	25 November 2014
Date of Judgment	:	9 December 2014
For the appellant	:	M. W. Mvune (Instructed by Cele, Mkhwanazi Attorneys)
For the Respondent	:	J. Du Toit (DPP, Pietermaritzburg)