

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



**IN THE HIGH COURT HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: CA

08/2023

REGIONAL COURT CASE NO:

RCB71/2017

In the matter between:

EVODIA MONYAPHENG

APPELLANT

and

THE STATE

RESPONDENT

Coram:

Petersen ADJP, Dewrance AJ

Heard: 29 July 2023

Handed down: 16 February 2024

ORDER

1. The appeal against conviction is upheld.
2. The conviction and resultant sentence are accordingly set aside.
3. The appellant is to be released from custody with immediate effect.

JUDGMENT

PETERSEN ADJP

Introduction

- [1] The appellant was charged and tried in the Regional Court, Mmabatho before Regional Magistrate S du Toit on charges of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 - (count 1) and theft (count 2). The appellant was duly convicted on 06 May 2020. On 08 May 2020, the appellant was sentenced to seventeen (17) years' imprisonment on count 1 and six (6) years imprisonment on count 2, with three (3) years of the imprisonment on count 2 ordered to run concurrently with the sentence on count 2. The appellant was therefore sentenced to an effective twenty (20) years imprisonment.
- [2] An application for leave to appeal both conviction and sentence was dismissed by the Regional Magistrate on 20 May 2020. On 23 November 2022, leave to appeal was granted on petition by Deputy Judge President Djaje and Acting Judge Malowa on both conviction and sentence, hence the present appeal.

Condonation

- [3] The appellant failed to prosecute the appeal timeously and filed an application for condonation for the late filing of the appeal accompanied by an affidavit in support of the application.
- [4] The application for condonation is unopposed. In *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*,¹ Ponnar JA re-

¹ [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA); 1962 (4) SA 531 (A) at 532 C - E

affirmed the factors to be considered in respect of an application for condonation stated in *Melane v Santam Insurance Co. Ltd*:

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

[5] The delay in prosecuting the appeal once leave to appeal was granted on petition is attributed to the appellant's attorneys, Legal Aid South Africa (LASA). The appellant was informed of the outcome of the petition on 12 December 2022. However, consultations with the appellant in preparation for the appeal and finalizing the papers only took place on 09 March 2023. No fault can be attributed to the appellant who at all material times from 12 December 2022 relied on LASA to prosecute the appeal within the prescribed period. Good cause exists for the granting of the application for condonation.

[6] The application for condonation for the late filing of the appeal is accordingly granted.

Grounds of appeal

[7] The grounds of appeal are set out in the Notice of Appeal as follows:

"AD CONVICTION

1. It will be argued that the trial court misdirected itself by failure to appoint assessors in terms of section 93ter (1) of the Magistrate's Courts Act 32 of 1944 and thus rendered the conviction unfair.

AD SENTENCE

2. It will be argued that the trial court misdirected itself by failure to find that the appellants cumulative personal circumstances are substantial and compelling circumstances justifying a departure from the prescribed sentence read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

2.1 In sentencing the appellant the trial court misdirected itself by imposing a term of seventeen (17) years imprisonment on a charge of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997.

2.2 It will be argued that the trial court misdirected itself by sentencing the appellant to a term of six (6) years imprisonment on a charge of theft of motor vehicle and ordering that three (3) years imprisonment to run concurrent with the sentence in count 1 effectively the appellant to serve a sentence of twenty (20) years imprisonment.

2.3 In sentencing the appellant to an effective twenty (20) years imprisonment the trial court misdirected itself by imposing a higher sentence which is shockingly inappropriate and out of proportion to the totality of the accepted facts in mitigation.

[8] The only ground of appeal on conviction is predicated on an alleged failure by the Regional Magistrate to comply with the provisions of section 93ter of the Magistrates' Courts Act 32 of 1944 ("the

MCA”), which is a question of law as envisaged in section 309(2) of the CPA.²

[9] In the heads of argument prepared by *Mr Gonyane* for the appellant, however, further argument is advanced on the merits of the conviction, both on the facts and in law. This engages the question whether an appellant may seek to assail his/her conviction on appeal, without giving notice of such additional ground/s of appeal in the Notice of Appeal. Section 309(3) of the CPA sets out the powers of a Provincial or Local Division on appeal, as follows:

“The provincial or local division concerned shall thereupon have the powers referred to in section 304(2), and, **unless the appeal is based solely upon a question of law**, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: **Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity of or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.**”

[10] This Court in accordance with section 309(2) of the CPA is therefore constrained to consider the appeal solely on the question of law raised on the interpretation of section 93ter(1) of the MCA. The further argument advanced by *Mr Gonyane* on the merits of the matter are therefore of no moment. It can only be considered by this Court on a very narrow basis if there is an irregularity or defect

² See *Director of Public Prosecutions, KwaZulu-Natal v Pillay* 2023 (2) SACR 254 (SCA) at paragraph [2].

in the record or proceedings which results in a failure of justice, of which exists in the present appeal.

Section 93ter (1) of the Magistrates' Courts Act 32 of 1944

[11] As alluded to *supra*, the only ground of appeal against conviction is a technical attack on the conviction predicated on an alleged failure by the Regional Magistrate to comply with the provisions of section 93ter of the MCA, on the basis that Regional Magistrate was not assisted by two assessors during the trial – the question of law. Section 93ter(1)(a) provides that:

'93ter Magistrate may be assisted by assessors

(1) The judicial officer presiding at any trial may, if he deems it expedient
for the administration of justice-

(a) before any evidence has been led;

....

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.'

(emphasis added)

[12] In the last two decades the interpretation of section 93ter(1) of the MCA has engaged our High Courts and the Supreme Court of Appeal on a regular basis. The most recent case being *Director of Public Prosecutions, KwaZulu-Natal v Pillay* 2023 (2) SACR 254 (SCA). I turn to discuss these authorities.

[13] The genesis of or catalyst for all the authorities on section 93ter(1) of the MCA is the Supreme Court of Appeal judgment in *S v Gayiya*³. The decisions in this Division are predicated in the main on *Gayiya*⁴. The Supreme Court of Appeal re-affirmed the decision of *Gayiya* in *S v Mntambo*⁵ as follows:

“[9] Until the judgment in S v Gayiya there were conflicting judgments in relation to the interpretation of s 93ter(1). This Court in Gayiya referred to Chala and Others v Director of Public Prosecutions, KwaZulu-Natal and Another, stating that the conflicting authorities had been succinctly dealt with in that case. In Gayiya, it was held that the appointment of assessors was peremptory, unless the accused requests, prior to him pleading to a charge of murder, that the trial should proceed without assessors. Mpati P stated:

‘In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before

³ [2016] ZASCA 65; 2016 (2) SACR 165 (SCA)

⁴ *Tsietsi Mmusi v The State* (Case No: CA55/2020); *Casswell v S* (CA 91/2022) [2023] ZANWHC 14 (18 January 2023).

⁵ (Case no 478/2020) [2021] ZASCA 17 (11 March 2021) at paragraphs [9] and [10]

which an accused is charged with murder (as in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.

...

[10] *The court held that the failure to comply with the proviso resulted in the court not being properly constituted and it set aside the conviction and sentence. In Shange v S, Lewis JA referred to and endorsed Gayiya. She stated:*

'In S v Gayiya 2016 (2) SACR 165 (SCA) this court, referring to Chala v DPP, KwaZulu-Natal 2015 (2) SACR 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not sat with assessors, and the accused had not requested that the trial not proceed with assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.' (emphasis added)

[14] In *DPP, KZN v Pillay* the Supreme Court of Appeal gave further clarity on the decision in *Gayiya* in drawing, *inter alia*, a distinction between an unrepresented accused and an accused who is legally represented when dealing with section 93ter(1) and the importance of a vigilant examination of the record in this regard. The following

extracts from *DPP, KZN v Pillay* are apposite and quoted extensively, to appreciate the peculiar position relevant to the present appeal:

[2] The appeal was prosecuted on the basis that it raises a question of law, namely the proper interpretation and application of s 93 ter (1) of the Magistrates' Courts Act 32 of 1944 (the MCA). The respondent rightly conceded that the issue in this matter raises a question of law.

...

[10] ... Since the Gayiya judgment, numerous High Court judgments have addressed s 93ter(1) of the MCA and sought to apply Gayiya. Some conflict in the interpretation and application of Gayiya has emerged. In the light of this, it is necessary to resolve the conflict.

...

[24] This brings me to the judgment in the matter under appeal. In this instance the High Court was aware of the judgment in Ngomane. It did not, however, engage with the conflict in approach between Ngomane and Langalitshoni. Instead, it asserted that –

'(i)n Ngomane the court appears to have entirely overlooked that in Gayiya the accused was also legally represented, and Mpati P clearly stated that the accused must be informed by the presiding officer at the trial that by law he or she is required to be tried in the presence of assessors. Accordingly, the issue of assessors is canvassed with the accused and that communication should appear in the record.'

[25] The High Court then considered Nxumalo, accepting that it endorsed Langalitshoni. It found on the facts that the respondents were not informed of the right to be tried in the presence of assessors. It concluded that, on the facts, the case was on all fours with Nxumalo and that it was bound by that judgment.

[26] *The High Court's perfunctory treatment of Ngomane on the basis that the court had overlooked the fact that, in Gayiya, the accused was represented, is unfortunate. It is also wrong. In Gayiya the accused was not represented at the stage that the trial court dealt with s 93ter...*

[27] *The High Court's error caused it to construe Gayiya as laying down a principle that the presiding officer is obliged to address an accused person directly, and to explain the ambit and effect of s 93ter(1) to an accused person without reference to their legal representative. Gayiya did not lay down such principle...**The judgment in Gayiya requires only that the magistrate presiding at the trial bring to the attention of an accused person the provisions of s 93ter(1) and establishes whether the accused has made a request to proceed without assessors. In the event that the accused makes such request, the magistrate may exercise a discretion regarding the appointment of assessors.***

[28] *It is necessary to say something about the request which may be made by an accused. The court in Langalitshoni construed s 93ter(1) as conferring upon an accused person a right to be tried by a 'fully' or 'properly' constituted court, namely a court including assessors. It held that the election not to do so amounts to a waiver of the right, which can only occur if the accused is fully cognisant of their rights. Other courts, as indicated, have also used the words 'election' and 'waiver' to characterise the request.*

[29] *Section 93ter(1) deals, as this court has held, with the constitution of the court. It regulates the criminal jurisdiction of a regional court. The section permits the involvement of persons, in addition to appointed judicial officers, in the adjudication of criminal matters within the jurisdiction of a magistrates' court. It does so on a discretionary basis by way of an election made by the presiding judicial officer, except in the case of a*

murder charge. In the latter case, the section provides for the peremptory involvement of assessors to assist the presiding judicial officer. In both instances, the participation of the assessors is delineated, and provision is made for disqualification, recusal and the continuation of the trial without an assessor.

[30] Section 93ter (1) does not confer upon an accused person a right to be tried by a 'properly constituted' court. **The language employed in s 93ter(1) confers only a right to request that the trial proceed without assessors.** The request is not dispositive. Once the request is made, the magistrate has a discretion to summon one or two assessors to assist them, notwithstanding the request. The fact that the court has a discretion to summon assessors, despite the request, effectively negates the notion of any kind of 'election' by the accused.

[31] **What s 93ter(1) requires is that an accused person must be informed of the section's mandatory provisions and that he may request that the trial proceed without assessors. Gayiya does not hold that the magistrate is obliged to only address the accused directly, or to explain the nature of the rights conferred by the section...**

[32] **Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person's constitutional rights are protected. But that general obligation is to be carried out in the light of the accused having exercised the right to legal representation. Section 25(3)(f) of the Constitution confers upon an accused person the right to choose and be represented by a legal practitioner. In S v Mpongoshe this court held that s 73(2) of the CPA confers upon an accused the wider right to be represented. In that case it was held that the right to legal representation**

encompassed the right to have a plea tendered vicariously by the legal representative.

[33] In *Beyers v Director of Public Prosecutions, Western Cape and Others*, it was held that:

'The idea of being represented by a legal adviser cannot simply mean having somebody stand next to you to speak on your behalf. Representation entails that the legal adviser will act in your best interest, will represent you, will say everything that needs to be said in your favour, and will call such evidence as is justified by the circumstances in order to put the best case possible before the court in your defence.'

[34] 'Representation' in this sense is not confined to the conduct of the trial. A legal representative, who is engaged to represent an accused, is obliged to act in the best interests of their client. That means, inter alia, to act according to the highest standards of professional ethics; to advise the client of their rights fully and properly; and to guide and advise the client in exercising those rights. The legal representative must prepare thoroughly and properly on all aspects of the case. **This includes advising the client about s 93ter(1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors.**

[35] A presiding officer must, in the first instance, respect an accused person's choice of legal representative and must defer to the legal representative's conduct of the matter. These are general principles which are well established. They inform our adversarial system of trial adjudication. It is against this backdrop that the duties of a trial magistrate must be viewed. **Where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a**

request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with s 93ter(1). As indicated in Gayiya, the presiding officer must take the lead in doing so at the stage before any evidence is led.

[36] The approach regarding the intended reliance upon prescribed minimum sentences, as provided by s 51 of Act 105 of 1997, is instructive. In *S v Legoa* it was held that the concept of substantive fairness under the Constitution requires that an accused be informed of facts which the state intends to prove to bring him within the increased sentencing jurisdiction provided by that Act. The court declined to lay down a general rule regarding the form of notice. It held that: 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'

[37] In *S v Kolea* this court reaffirmed the principle in *Legoa*. It also endorsed the approach set out by Ponnann JA in a minority judgment in *S v Mashinini and Another*, where the learned judge stated that the fair-trial enquiry is first and foremost a fact-based enquiry. The court in *Kolea* held that the conclusion to which the majority had come was wrong.

[38] **Although we are not here dealing with a fair-trial enquiry, compliance with s 93ter(1) of the MCA is no less a fact-based enquiry. In light of this, it is equally undesirable to lay down a general rule regarding what must be done to establish compliance with the section.** The set of guidelines proffered in *Langalitshoni* strays into this terrain. The requirements are at odds with the notion of a right to legal representation. They are also premised upon a misconception of the nature of the right conferred by s 93ter(1) and the application of principles of waiver.

[39] *The High Court concluded that the respondent's right was not explained to him. Before this court, counsel for the respondent contended that whatever had occurred at the pretrial remand proceedings was irrelevant, since it was the trial magistrate who was obliged to explain and act in accordance with the section. The argument is without substance. **The purpose of the pretrial conference is to ensure that the enrolled case is ready to proceed to trial. Such pretrial proceedings are not to be ignored.***

[40] ***The notes made by the magistrate presiding at the pretrial remand hearing state that the provisions of the section were explained to the accused. They were understood. The legal representative said that the two accused did not require assessors. This was plainly a request that the trial proceed without assessors. The accused confirmed this to be so. Thus, when the trial magistrate asked the legal representative whether that was still the case, he sought to confirm the request.***

[41] *On the facts, s 93ter(1) was complied with. The High Court ignored the facts as disclosed on the record. In the circumstances, the High Court erred both in respect of the law relating to the section and in its application to the facts. It follows that the appeal must succeed..."*
(emphasis added)

The present appeal (the record of proceedings (pre-trial and trial) in respect of the appointment of assessors in the court a quo

[15] The pre-trial record which forms part of the Charge Sheet (J15), on the issue of the appointment of assessors, reads as follows:

"On 06 November 2018

PO: Mr. Du Toit
PP: Mr. Mudau
Int: Mr. Mokgothu
Def: Adv. Segopolo

Proceedings digitally recorded. Adv. Segopolo confirms that they consulted.
Ready for trial.

PP: State also ready for trial.

Adv. Segopolo: Assessors not required. Minimum sentence of life imprisonment explained to accused.

She states that she understands.

Remanded to 17 and 18 January 2019 for trial. The accused on bail, warned for 08h30.

Witnesses Letlhogonolo Mangope, Maruping

Warned for 08h30. Witness fees to be paid to Letlhogonolo Mangope for Lichtenburg.

Mr du Toit
6/11/2018.”

[16] The record of proceedings which were digitally recorded on 06 November 2018 does not form part of the appeal record. The digital recording of proceedings commences on 17 January 2019. The importance of the record of the proceedings which were digitally recorded is demonstrated by what consequently transpired on 18 July 2019. On the said date, *Mr Segopolo* for the accused indicated that

the accused had not indicated that no assessors were required for trial purposes on 06 November 2018. The Regional Magistrate clearly relied on the entry of 6 November 2018 which formed part of the J15 in engaging *Mr Segopolo* on the issue.

[17] The trial record of 18 July 2019 on the issue of the appointment of assessors reads as follows:

MR SEGOPOLO: Your Worship, before we proceed further may I quickly approach the accused?

COURT: And just to confirm, I think you indicated previously that we proceed without assessors. I just want to confirm.

MR SEGOPOLO: We have never indicated that we are proceeding without assessors. However, I do not have instructions whatsoever to proceed with assessors. May I confirm with my client?

COURT: You see, on 6 November...

MR SEGOPOLO: Yes.

COURT: You confirmed you are ready for trial and you said assessors not required. You confirmed that you consulted, you confirmed you were ready for trial, and you indicated assessors not required.

MR SEGOPOLO: I now received instructions [intervened]

COURT: The witnesses were here and they were warned but we did not proceed in January.

MR SEGOPOLO: On the strength of what the court has just said to me I approach accused.

We may proceed without same.

COURT: Thank you."

[18] In preparation of the judgment, this Court called for the digital record of proceedings of **06 November 2018**, to comply with the duty to vigilantly examine the entire record of proceedings; and to confirm that the entry recorded on the charge sheet accords with the digital recording. *DPP KZN v Pillay* provides an injunction that “**The purpose of the pretrial conference is to ensure that the enrolled case is ready to proceed to trial. Such pretrial proceedings are not to be ignored.**” An entry on the record that the matter is ready for trial on its own does not suffice. The transcribed proceedings of **06 November 2018** which were digitally recorded, in relevant part, reads as follows:

“PROCEEDINGS HELD ON 6 NOVEMBER 2019 [09H42]

PROSECUTOR: Sephoko Evodia Monyapheni. As the court pleases, Your Worship. Adv Sekololo (meant to read Sekgopolo) is representing the accused. Matter was adjourned up until today. Your Worship, for consultation.

COURT: Mr Sekgopolo, did you consult with the accused?

MR SEKGOPOLO: As the court pleases, Your Worship. I confirm that we have consulted. We are in a position to can set a trial date today.

COURT: The State is also ready for trial?

PROSECUTOR: Yes, Your Worship.

COURT: How many witnesses to be called in this matter?

PROSECUTOR: Seven, Your Worship.

*COURT: **Mr Sekgopolo, assessors required?***

*MR SEKGOPOLO: **We are going to waive our rights for assessors, Your Worship. No need for same.***

COURT: And this is section 51(1)?

PROSECUTOR: Yes, Your Worship.

COURT: Premeditated murder.

PROSECUTOR: Yes, Your Worship.

COURT: The charge is premeditated murder. If convicted, a sentence of life imprisonment must be imposed.

ACCUSED: Understood, Your Worship....”

[19] The pre-trial hearing held by the Regional Magistrate on **6 November 2018**, falls shy of substantial compliance with the Regional Court Practice Directives (applicable at the time) which gives effect to the Norms and Standards issued by the Chief Justice. In terms of the *Regional Criminal Court Practice Directives, 2017, 5th Revision*⁶, a number of issues (not constituting a *numerus clausus*) which needed to be canvassed are enumerated as follows:

“3 JUDICIAL CASE MANAGEMENT: PRE-TRIAL HEARING AND
CERTIFICATION OF CASES AS TRIAL READY

In compliance with paragraph 5.2.4 of the Norms and Standards dealing with judicial case flow management, no matter may be enrolled for trial unless certified trial-ready by a court.

3.1 Prior to certifying the case as trial ready a court must have conducted a pre-trial hearing during the court proceedings.

3.2 At the pre-trial hearing the issues enumerated below, but not limited thereto, are to be considered and addressed, where relevant:

3.2.1 Whether the prosecution is ready to proceed to trial?

3.2.2 Whether the accused/defence is ready to proceed to trial?

⁶ Presently Revised by a 2023 Revision

3.2.3 Whether the accused person is legally represented and in the case of a private practitioner, whether the legal representative has sufficient funds or acceptable financial arrangements for the determined number of trial dates.

3.2.4 Whether the legal representative has received copies of the final charge sheet, further particulars (if any) and a copy of the docket/statements;

3.2.5 Whether the legal representative has consulted with accused person.

3.2.6 Where multiple accused have the same legal representative, whether there is a possibility of any conflict of interest.

3.2.7 Whether the parties had exhausted all possibilities to make representations to the prosecution.

3.2.8 Whether the state intends to present any evidence of a technical nature. This may include, for example, admissions or confessions, pointing out by the accused person, forensic evidence, expert testimony or statements in terms of section 212 of the Criminal Procedure Act, 51 of 1977 (CPA) or other documentary evidence. 3.2.9 The number of Accused and the number of legal representatives.

3.2.10 The number of witnesses the prosecution intends to call.

3.2.11 Whether such witnesses include any child witnesses, witnesses with mental or other disabilities.

3.2.12 Whether an appropriate language intermediary is necessary and whether arrangements have been made.

3.2.13 Whether there are any technical requirements for the trial, such as the use of an intermediary, audio visual equipment, etc.

3.2.14 Whether any foreign language interpreters or other specific interpreters are necessary for any of the Accused or for any of the witnesses and whether any arrangements have been made.

3.2.14.1 The court must conduct an inquiry to determine the language the Accused understands (as provided in s 35(k) of the Constitution) rather than the mother tongue or preferred language of the Accused. Such enquiry must be recorded. 3.2.15 Whether the appointment of assessors is necessary?"

[20] In *DPP KZN v Pillay*, the SCA stated it is undesirable to lay down a general rule regarding what must be done to establish compliance with the section. A value judgment, having regard to the peculiar facts of each matter is therefore required, avoiding a one size fits all approach.

[21] The pre-trial conference in *DPP KZN v Pillay* is distinguishable from the present matter in that **“The notes made by the magistrate presiding at the pretrial remand hearing state that the provisions of the section were explained to the accused. They were understood. The legal representative said that the two accused did not require assessors. This was plainly a request that the trial proceed without assessors. The accused confirmed this to be so. Thus, when the trial magistrate asked the legal representative whether that was still the case, he sought to confirm the request.”** In the present matter, the only recordal about assessors at the pre-trial conference attributed to *Mr Sekgopolo* is “Assessors not required.” There was no further engagement on the issue by the Regional Magistrate with *Mr Sekgopolo*.

[22] As *DPP KZN v Pillay* re-iterates with reference to *Gayiya*, is that what is required is that the magistrate presiding at the trial bring to the attention of the accused what section 93ter(1) requires, that being that he may request that the trial proceed without assessors, and that where the accused is legally represented that such legal representative, who is obliged to act in the best interests of their client, advise the client of their rights fully and properly; **and to guide the client in exercising those rights which includes advising the client**

about s 93ter(1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors. Very importantly, *DPP KZN v Pillay* postulates that “Where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with s93ter(1). As indicated in Gayiya, the presiding officer must take the lead in doing so at the stage before any evidence is led.”

[23] In the present matter, the pre-trial conference of 06 November 2018 falls shy of the obligation placed on the Regional Magistrate as postulated in *DPP KZN v Pillay*. The transcribed record and the entry in the charge sheet reflects simply that *Mr Sekgopolo* waived the rights to assessors. There was no further enquiry whether the appellant was appraised of her rights in respect of section 93 *ter* by *Mr Sekgopolo* and that she understood same, so as to instruct *Mr Sekgopolo* to waive those rights. What transpired on 19 January 2019 does nothing to ameliorate the shortcomings in the pre-trial conference of 6 November 2018. Instead, what it demonstrates is that *Mr Sekgopolo* disavowed the recordal of 6 November 2018 and appears not have been given an opportunity to properly advise and receive instructions from the appellant on the issue of section 93 *ter*(1) of 19 January 2019 as is evident from the following:

“On the strength of what the court has just said to me I approach accused.
We may proceed without same.”

Conclusion

[24] The effect of not complying with section 93ter (1) in line with *DPP KZN v Pillay* is that the court was not properly constituted and the conviction and sentence as in *Gayiya, Shange and Mntambo* stands to be set aside.

Order

[25] In the result the following order is made:

1. The appeal against conviction is upheld.
2. The conviction and resultant sentence are accordingly set aside.
3. The appellant is to be released from custody with immediate effect.

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH
NORTHWEST DIVISION, MAHIKENG

I agree.

M DEWRANCE

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG**

APPEARANCES:

For appellant: Mr T. G. Gonyane

Instructed by: Legal Aid South Africa
Mahikeng Justice Centre

For respondent: Adv J. Maseko

Instructed by: The Director of Public Prosecutions, Mahikeng