



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 706/2022

In the matter between:

**DIRECTOR OF PUBLIC
PROSECUTIONS, KWAZULU-NATAL**

APPELLANT

and

BRIAN MUNSAMY PILLAY

RESPONDENT

Neutral citation: *Director of Public Prosecutions, KwaZulu-Natal v Pillay*
(706/2022) [2023] ZASCA 105 (23 June 2023)

Coram: DAMBUZA ADP and SCHIPPERS, MOTHLE, MATOJANE and
GOOSEN JJA

Heard: 5 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 23 June 2023.

Summary: Criminal procedure – appeal in terms of s 311 of Criminal Procedure Act 51 of 1977 – constitution of trial court in terms of s 93ter(1) of Magistrates' Courts Act 32 of 1944 — whether peremptory requirements of s 93ter(1) satisfied – duties of magistrate when accused represented– appeal upheld – conviction and sentence reinstated.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mathenjwa AJ and Ploos van Amstel J, sitting as court of appeal):

- 1 The appeal is upheld.
- 2 The high court's order is set aside.
- 3 The respondent's conviction and sentence imposed by the Regional Court Durban, are reinstated.
- 4 The respondent's appeal against his conviction is remitted to the high court.

JUDGMENT

Goosen JA (Dambuza ADP and Mothle and Matojane JJA concurring):

[1] This is an appeal by the Director of Public Prosecutions, KwaZulu-Natal (the DPP), in terms of s 311 of the Criminal Procedure Act 51 of 1977 (the CPA). It lies against an order of the High Court, KwaZulu-Natal Division, Pietermaritzburg (the high court), which set aside the conviction and sentence of the respondent on a charge of murder.

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

¹ *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 46.

[3] The facts are common cause. The respondent and a co-accused were charged with murder. The trial proceeded before the Regional Court for the Regional Division of KwaZulu-Natal at Durban (the trial court). It commenced on 18 May 2018. The respondent was legally represented throughout the proceedings before the trial court. The record reflects several court appearances before the commencement of the trial. The entries consist of handwritten notes recorded by the presiding officer. On 26 February 2018, the accused appeared in court. They were represented by Mr Luckychand. The case was remanded to 7 March 2018 ‘for PTC’, which was accepted to be shorthand for ‘pre-trial conference’.

[4] On 7 March 2018, the pre-trial conference occurred in open court. Both the respondent and his co-accused were present and were represented by Mr Luckychand. The re-typed entry on the record reads as follows:

‘Both accused before Court.

Both accused are advised of the use of lay assessors – duly understood.

Mr Luckychand confirm that no assessors will be required.

Both accd confirm the same

PTC held – See annexure.

1 day available for trial [illegible] evidence admitted.’

[5] The trial commenced on 18 May 2018. The record reads as follows:

‘COURT: Okay, just before we proceed, Mr Luckychand, you confirm for the record that no assessors are required in this matter?’

MR LUCKYCHAND: That’s correct, Your Worship.’

[6] On 18 August 2018, the respondent was convicted of murder. His co-accused was acquitted. He was sentenced to 10 years’ imprisonment on 21 August 2018. The respondent was granted leave to appeal against his conviction. On 25 May 2022, shortly before the hearing of the appeal, the high

court issued a directive requiring the parties to file supplementary heads of argument dealing with whether there had been compliance with s 93ter(1) of the MCA. That issue had not been raised as a ground of appeal. The appeal was heard on 2 June 2022. On 10 June 2022, the high court delivered judgment, which dealt only with the constitution of the trial court. It held that the peremptory requirements of s 93ter(1) had not been satisfied and it set aside the respondent's conviction.

[7] The appeal squarely raises the proper interpretation of s 93ter(1) of the MCA and its application. The section provides that:

‘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; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

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 the 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.’

[8] In *S v Gayiya*² this Court held that s 93ter(1) prescribes the proper constitution of the court before which an accused stands trial.³ It was held that in the event that the court is not properly constituted, the proceedings are a nullity.

[9] In relation to the effect of the section, this Court held:

² *S v Gayiya* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA).

³ *Gayiya* fn 2 above para 8 read with para 11.

‘The section is peremptory. It ordains that the judicial officer presiding in a regional court before 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 passage is clear and unequivocal. This statement of law has been reiterated by this Court in *Shange v S*⁴ and in *Mtambo v The State*.⁵ Since the *Gayiya* judgment in 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.

[11] In *S v Langalitshoni*,⁶ a full bench of the Eastern Cape Division set aside the conviction of the accused by a regional court on the basis that s 93ter(1) was not complied with. In that matter, the accused was legally represented. After referring to the quoted passage from *Gayiya*, the court said:

‘The statement of the legal principle quoted in the preceding paragraph has the effect of creating an obligation on the part of a regional magistrate presiding over a trial involving a charge of murder. There are two essential elements to the obligation. The first is to inform the accused person before the commencement of the proceedings what the peremptory provisions of the law require to ensure the proper constitution of the regional court. The second is to inform the accused person that he or she may elect to proceed with the trial without assessors.’⁷

⁴ *Shange v S* [2017] ZASCA 51 para 5.

⁵ *Mtambo v State* [2021] ZASCA 17 para 9.

⁶ *S v Langalitshoni* [2018] ZAECMHC 75; 2020 (2) SACR 65 (ECM).

⁷ *Langalitshoni* para 8.

[12] The court then set out what a trial magistrate is required to do to discharge the obligation, both when the accused is unrepresented and represented. In relation to the latter scenario, the court said,

‘What is required is a repetition of the legal principle quoted elsewhere in this judgment. Ideally, communication of the legal principle should be made in a direct manner by the magistrate addressing the accused person, who should be asked at that stage to indicate whether he or she has been made aware of the peremptory provisions. The legal representative of the accused person may then be asked by the magistrate to confirm the correctness of the answer given by the accused person. It is then necessary for the magistrate to ask specifically whether the accused person wishes to permit the trial to proceed without assessors. At this point a magistrate would not be criticised for giving a brief outline of the role played by assessors in a criminal trial. The magistrate ought to be satisfied that the answer given by the accused person demonstrates an appreciation of the nature of the question and reflects a reliable response in the circumstances. The accused person has the right to be tried in a fully constituted court. An election to proceed without assessors amounts to a waiver of such right. A waiver of a right cannot be achieved without knowledge thereof. That this is so should be checked with the accused person and the legal representative.’⁸

[13] The court concluded that in asking the legal representative ‘are you going to use the services of the assessors?’, the magistrate did not convey that the ‘proper constitution of the court requires that the magistrate ordinarily sit with two assessors.’⁹ It concluded that the question was misleading since it suggested that the use of assessors involved an ‘additional right’. The questions and answers did not, it found, indicate that the accused with full knowledge, waived his right to a trial before ‘a properly constituted court’.

[14] In *S v Ngomane and Another*,¹⁰ the accused was also legally represented and, on two separate occasions before the commencement of the trial, the question of the composition of the court in terms of s 93ter(1) was addressed.

⁸ *Langalitshoni* fn 6 above para 9.

⁹ *Langalitshoni* fn 6 above para 11.

¹⁰ *S v Ngomane and Another* [2021] ZAGPPHC 172; 2021 (2) SACR 654 (GP).

The record of these exchanges was cryptic. The court took the view that the fact that the notes were cryptic, was of no consequence. The magistrate was, it held, clearly alert to the issue of assessors by addressing it on two occasions.¹¹

[15] Dealing with *Langalitshoni*, the court in *Ngomane*, reasoned that:

‘Accordingly, when the accused is legally represented, there is no overriding duty on the presiding magistrate to explain to the accused in any detail each and every single one of his numerous constitutional rights.’¹²

...

‘It is obvious in this case that the legal representative of the appellants was also fully alert to the issue of assessors, which was attended to and disposed of when the appointment of assessors was addressed by the magistrate and waived on behalf of the appellants. The section provides that only the accused, obviously as advised by his legal representative and through his legal representative, may waive the appointment of assessors.’¹³

[16] These passages indicate a sharp difference in judicial opinion. It is two-fold. On the one hand, it relates to the ambit of a magistrate’s duties in relation to s 93ter(1) of the MCA where the accused is represented. On the other, it concerns the sufficiency of ‘evidence’ required to establish that an accused person has elected to proceed with a trial in the absence of assessors. There are several judgments in the KwaZulu-Natal Division, of which the judgment under appeal is one, where the issue has arisen.

[17] Before dealing with these judgments, reference should be made to *Chala and Others v Director of Public Prosecutions, KwaZulu-Natal, and Another*,¹⁴ which predates *Gayiya*. In that matter, Vahed J concluded that a failure to properly invoke the provisions of the section would always constitute a fatal

¹¹ *Ngomane* para 17.

¹² *Ngomane* para 19.

¹³ *Ngomane* para 20.

¹⁴ *Chala and Others v Director of Public Prosecutions, KwaZulu-Natal, and Another* [2014] ZAKZPHC 62; 2015 (2) SACR 283 (KZP).

irregularity resulting in the proceedings being set aside.¹⁵ The learned judge then went on to state:

‘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 93ter is required to be invoked, that a proper explanation is given by the magistrate to the 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.’¹⁶

[18] In *Nxumalo v S*,¹⁷ the court raised the issue of the constitution of the court in terms of s 93ter(1), in an appeal against the sentence. The accused were legally represented at the trial. The record indicated that, on 26 September 2013, their legal representative informed the court that ‘the defence does not require assessors’. At a pre-trial conference held on 9 December 2013, this was reiterated. When the trial commenced on 31 March 2014, the magistrate asked the legal representative whether what was recorded at the pre-trial conference was still the case, and it was confirmed.

[19] The court held that *Gayiya* had endorsed the approach set out in *Chala*.¹⁸ It held that *Langalitshoni* had expanded on the approach previously adopted. It found that the proviso to s 93ter(1) was never explained to the accused and that he had not made a request not to sit with assessors. It set aside the conviction and sentence.

¹⁵ *Chala* para 27.

¹⁶ *Chala* para 28.

¹⁷ *Nxumalo v S* [2022] ZAKZDHC 23 (10 February 2022) (Lopes and Ploos Van Amstel JJ).

¹⁸ *Nxumalo* para 7.

[20] On 28 March 2022, judgment was delivered in *Hlatshwayo and Another v S*.¹⁹ It followed *Nxumalo*. It held that the record did not disclose that the proviso was explained and found that the trial court was not properly constituted. It set aside convictions and sentences. *Zulu v State*²⁰ was delivered on 13 May 2022. In that case, the question relating to the constitution of the trial court in terms of s 93ter(1) was not dealt with in pre-trial proceedings. *Zulu* also followed *Nxumalo*. The court set aside the convictions and remitted the matter to the regional court for the trial to commence *de novo*.

[21] On 29 July 2022, the judgment in *Green v State*²¹ (*Green*) was delivered.²² *Green* marked a departure from the approach adopted in the earlier judgments. In that matter, the minute of a pre-trial conference recorded that ‘no lay assessors [are] required.’ Dumisa AJ, who wrote the main judgment, accepted that the requirements of s 93ter(1) were met. He held that there was no reason to doubt the competence of the legal representative and that the court was entitled to assume that the accused had made his election with the benefit of advice.

[22] In a concurring judgment, Olsen J addressed the conflict between *Ngomane* and *Langalitshoni*. In relation to the judgments of *Nxumalo*, *Hlatshwayo* and *Zulu*, Olsen J stated:²³

‘I have not found a report of any case in this division in which it was held, before the judgment in *Langalitshoni* was handed down, that a simple record of a request by an accused (conveyed by his legal representative) that the magistrate sits alone is inadequate to establish the proper constitution of a court presided over by a magistrate alone. That accords with my understanding of the attitude of this Court at the time, that a record of the choice alone is

¹⁹ *Hlatshwayo and Another v State* [2022] ZAKPHC 8 (28 March 2022) (Bezuidenhout AJ and Ploos van Amstel J).

²⁰ *Zulu v State* [2022] ZAKPHC 20 (13 May 2022) (Khallil AJ and Chili J).

²¹ *Green v State* [2022] ZAKPHC (29 July 2022) (Dumisa AJ and Olsen J).

²² Judgment in the matter presently under appeal was delivered on 10 June 2022, after *Green* was argued, but before judgment was delivered.

²³ *Green* fn 21 above para 21.

sufficient. I have found three judgments which post-date *Langalitshoni* in which that case was followed in this division without comment. [References to *Nxumalo*, *Hlatshwayo* and *Zulu* omitted.]

Despite the fact that *Ngomane* was published in 2021, the judgment was not drawn to the attention of the judges who presided in the three cases, just mentioned. Being unaware of this conflict, they did not deal with it. In the circumstances, I do not believe that in this appeal we are bound to follow the three decisions.’

[23] The court was critical of the use of phrases like ‘properly constituted court’, or ‘fully constituted court’ as used in *Langalitshoni*. It was critical of its characterisation of the accused’s election as being an incidence of waiver. It declined to follow the *Langalitshoni* reasoning.

[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:

‘In *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. There are several passages in the judgment of Mpati P which indicate this fact. For instance, the judgment indicates that the court questioned the accused on his plea of guilty to satisfy itself that he admitted all of the elements of the offences. The judgment records that the accused addressed the court after he had closed his case. He also addressed the court in relation to the sentence. This would not have occurred had the accused been represented.

[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, it must also be stated, did not endorse the approach advocated in *Chala*.²⁴ It merely referred to the exposition of the case law set out in *Chala*.²⁵ The judgment in *Gayiya* requires only that the magistrate presiding at the trial brings 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

²⁴ As erroneously stated in *Nxumalo* and *Hlatshwayo*. See para 19 above.

²⁵ *Gayiya* fn 2 above para 7.

their rights. Other courts, as indicated, have also used the words ‘election’ and waiver’ to characterise the request.

[29] Section 93*ter*(1) deals, as this Court has held, with the constitution of the court. It regulates the criminal jurisdiction of a regional court.²⁶ The section permits the involvement of persons, in addition to appointed judicial officers, in the adjudication of criminal matters within the jurisdiction of a magistrate’s 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.²⁷

[30] Section 93*ter* (1) does not confer upon an accused person a right to be tried by a ‘properly constituted’ court. The language employed in s 93*ter*(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

²⁶ The section appears in Chapter XII of the MC Act, which relates to the criminal jurisdiction of the magistrate’s court.

²⁷ MC Act s 93*ter*(11) provides:

‘(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.’

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. It is not necessary, for present purposes, to traverse the obligations imposed upon a judicial officer in circumstances where an accused person is unrepresented. They are well understood.

[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*²⁸ this Court held that section 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*,²⁹ it was held that:

‘The idea of being represented by a legal adviser cannot simply mean having somebody next to you to speak on your behalf. Representation entails that the legal adviser will act in your best interests, will represent you, will say everything that need be said in your favour, and

²⁸ *S v Mpongoshe* 1980 (4) SA 593 (A) at 603B-C.

²⁹ *Beyers v Director of Public Prosecutions, Western Cape* 2003 (1) SACR 164 (C) at 166j-167a.

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 of 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.³⁰ 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 a 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*,³¹

³⁰ See *R v Matonsi* 1958 (2) SA 450 (A) at 456; *R v Baartman and Others* 1960 (3) SA 535 at 538; *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux* 1988 (2) SA 868 (A) at 874E; *S v Louw* 1990 (3) SA 116 (A) at 124B-125E.

³¹ *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA).

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 upon a vigilant examination of the relevant circumstances.’³²

[37] In *S v Kolea*,³³ 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*,³⁴ 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.³⁵

[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 pre-trial remand proceedings was irrelevant since it was the trial

³² *Legoa* para 21.

³³ *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA) para 8.

³⁴ *S v Mashinini and Another* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA) para 51.

³⁵ *Kolea* fn 33 above para 37.

magistrate who was obliged to explain and act in accordance with the section. The argument is without substance. The purpose of the pre-trial conference is to ensure that the enrolled case is ready to proceed to trial. Such pre-trial proceedings are not to be ignored.

[40] The notes made by the magistrate presiding at the pre-trial 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 proceeds 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.

[42] The respondent was granted leave to appeal against his conviction. The high court did not deal with the merits of the appeal against conviction. The consequence of this Court's finding on appeal, must be that the respondent's conviction and sentence are reinstated. Once that is so he is entitled to prosecute his appeal in the high court.

[43] In the result, the following order will issue.

- 1 The appeal is upheld.
- 2 The high court's order is set aside.

3 The respondent's conviction and sentence imposed by the Regional Court Durban, are reinstated.

4 The respondent's appeal against his conviction is remitted to the high court.

G G GOOSEN
JUDGE OF APPEAL

Schippers JA

[44] I have had the benefit of reading the first judgment by my colleague Goosen JA. I agree that the appeal should be upheld, but I come to that conclusion by a shorter route. In what follows, I utilise the same abbreviations used in the first judgment.

[45] The issue raised in this appeal is one of statutory interpretation: whether there has been compliance with s 93*ter*(1) of the MCA. It provides:

'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; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

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 the 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.’

[46] The issue arose in the following circumstances. The respondent and his co-accused were charged with murder in the Regional Court, Durban, KwaZulu-Natal. They were legally represented. The record shows that that at a pre-trial conference they were advised of the use of lay assessors, which they understood; that their attorney confirmed that no assessors would be required; and that the same was confirmed by the accused.

[47] A different magistrate presided over the trial. The accused were represented by the same attorney. Before the trial commenced, the magistrate asked the attorney to confirm that no assessors were required, which he did. The trial proceeded without assessors. The respondent was convicted of murder and sentenced to ten years’ imprisonment. His co-accused was acquitted.

[48] The respondent was granted leave to appeal to the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court). Prior to the hearing of the appeal, the high court (Mathenjwa AJ and Ploos van Amstel J) issued a directive that the parties file supplementary heads of argument on the question whether there had been compliance with the proviso to s 93ter(1) of the MCA (the proviso).

[49] The high court did not deal with the merits of the appeal. It held that there was no compliance with the proviso and set aside the respondent’s conviction and sentence. The court referred to *Langalitshoni*,³⁶ in which the magistrate

³⁶ *S v Langalitshoni* [2018] ZAECMHC 75; 2020 (2) SACR 65 (ECM).

enquired of the accused's legal representative whether he was going to use the services of assessors. The representative replied that assessors were not required. The court in *Langalitshoni* held that ideally, the magistrate should ask the accused directly whether he or she has been made aware of the proviso; the legal representative 'may then be asked by the magistrate to confirm the correctness of the answer given by the accused person'; and it is then necessary for the magistrate to specifically ask whether the accused wishes that trial proceed without assessors.³⁷ It set aside the accused's conviction and sentence for want of compliance with the proviso.

[50] The high court also referred to the contrary approach in *Ngomane*.³⁸ There, the court (Bam J and Munzhelele AJ) declined to follow *Langalitshoni* and held that the legal representative of the appellants was alert to the issue of assessors; that it had been addressed by the magistrate on two separate occasions; and that the appointment of assessors had been waived on behalf of the appellants. It concluded that when the accused is legally represented, there is no need for the magistrate to explain to the accused in minute detail what the MCA provides, and what their rights are in relation to assessors.

[51] In this case, the high court reasoned that the trial court was not properly constituted at the pre-trial conference; and that before commencement of the trial, the respondent had not been informed that 'as a matter of law he had a right to be tried in the presence of assessors and with full knowledge thereof he elected not to be tried in the presence of assessors'. The court said that the appeal 'is on all fours with the facts in *Nxumalo*',³⁹ and that it was bound by that decision. In *Nxumalo* the record reflected that the accused's legal representative had informed the court that 'the defence does not require assessors', which the

³⁷ Ibid para 9.

³⁸ *S v Ngomane and Another* [2021] ZAGPPHC 172; 2021 (1) SACR 654 (GP) (*Ngomane*).

³⁹ *S v Nxumalo* [2022] ZAKZDHC 23.

representative confirmed at a pre-trial conference and prior to the commencement of the trial.

[52] The high court relied on the following paragraphs in *Nxumalo*:

‘ . . . Mr Nxumalo himself [the accused], was not involved in these discussions, save for being present when the learned magistrate spoke to Mr Zulu [the legal representative].

The proviso was never explained to Mr Nxumalo, and he never made a request not to sit with assessors. Whether his legal representative explained the proviso to him, is also not reflected on the record. Had that been the case, the learned magistrate could have engaged Mr Nxumalo so that he could have confirmed his understanding of the section, and his request not to have assessors’.⁴⁰

[53] It is trite that statutory interpretation is a unitary exercise which requires a court to determine the meaning of a provision, having regard to the language used, the context in which it is used and the purpose of the provision.⁴¹ As was held in *Endumeni*,⁴² ‘[t]he inevitable point of departure is the language of the provision itself’.⁴³ These are the words which the lawgiver has chosen to enact to express the purpose of the legislation and are thus the primary source by which meaning is ascertained.

[54] The proviso, on its plain language, states that a regional court magistrate must be assisted by two assessors where an accused is charged with murder, unless the accused requests that the trial proceed without assessors. These requirements are peremptory.⁴⁴ Prior to the commencement of the trial, the

⁴⁰ Ibid paras 9 and 10.

⁴¹ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 25.

⁴² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).

⁴³ Ibid para 18.

⁴⁴ *S v Gayiya* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA) paras 8 and 11.

regional magistrate must inform the accused of the proviso – an uncomplicated obligation as appears from *Gayiya*.⁴⁵

[55] The proviso says nothing about the ‘waiver’ of a right that the judicial officer be assisted by two assessors. Instead, it refers to a ‘request’ by an accused that the trial proceed with or without assessors. A ‘request’ is defined in the Oxford English Dictionary⁴⁶ as ‘[t]he action or an instance of asking . . . for something’. Similarly, it is defined as ‘the act of politely or officially asking for something’,⁴⁷ or asking for something formally.⁴⁸

[56] Thus, on its plain wording, the proviso prescribes the constitution of a regional court in which an accused is charged with murder, unless the accused formally asks that the trial proceed without assessors. Put differently, the request is a statement of the accused’s desire that no assessors are required. And it makes no difference whether that request is conveyed to the magistrate by the accused himself, or by his legal representative. This construction is consistent with the purpose of the proviso: to promote lay participation in the adjudication of criminal cases in order to achieve a measure of community involvement in the criminal justice system,⁴⁹ unless the accused requests otherwise.

[57] The proviso is silent on the manner in which an accused must be informed of the court’s composition; or whether a statement or confirmation by an accused’s legal representative that the trial may proceed without assessors, constitutes compliance with the proviso. Sensibly interpreted however,⁵⁰ as long as it appears from the record of the proceedings that an accused has been

⁴⁵ Ibid para 8.

⁴⁶ L Brown *The New Shorter Oxford English Dictionary on Historical Principles* 3 ed (1993) Vol 2 p 2556.

⁴⁷ <https://dictionary.cambridge.org/dictionary/english/request>.

⁴⁸ <https://www.collinsdictionary.com/dictionary/english/request>.

⁴⁹ A Kruger *Hiemstra’s Criminal Procedure* 21-9 Issue 12 (May 2019).

⁵⁰ *Endumeni* para 18.

informed of the proviso – by the magistrate or the accused’s legal representative – and that there is a formal request that the trial proceed without assessors, there will be compliance with the proviso. Whether there has been such compliance is a question of fact to be determined in light of the circumstances of the particular case.

[58] In the case of an accused who is legally represented, it is implicit in a statement or request to the magistrate that no assessors are required, that the accused has been informed of the proviso. This is because judicial officers ‘act on the assumption that a duly admitted lawyer is competent’, as stated by this Court in *Halgryn*.⁵¹ Legal competence necessarily entails knowledge of the law and in this case, the proviso. It can therefore be accepted that a legal representative would inform the accused of the proviso, explain its requirements, and that when the representative informs the court that assessors are or are not required, that the accused has understood what has been explained to him or her, unless, in the exceptional case, something emerges which suggests otherwise.⁵²

[59] It is self-evident that an attorney or advocate must demonstrate legal expertise, honesty and faithfulness in the conduct of his or her client’s case.⁵³ It is the duty of the legal representative ‘to ensure that the accused’s constitutional rights are not violated and that the accused has a fair trial in accordance with all procedural aspects and relevant legislation’.⁵⁴ For these reasons, the manner in which the client’s case is to be conducted, vests in the legal representative. In the words of Schreiner JA:

‘ . . . Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client is to be called

⁵¹ *S v Halgryn* [2002] ZASCA 59; 2002 (2) SACR 211 (SCA); [2002] 4 All SA 157 (SCA) para 12.

⁵² *S v Green* [2022] ZAKZPHC 31 para 23.

⁵³ *R v Matonsi* 1958 (2) SA 450 (A) at 458A per Van Blerk AJA.

⁵⁴ *Ngomane* para 22; *Ibid* para 21.

or not. So in *Swinfen v Lord Chelmsford*, 157 E.R. 1436 at p. 1449, POLLOCK, C.B., states the Court's view that,

“a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, the things ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial”.⁵⁵

[60] Counsel's authority over the suit however, does not detract from the mandatory requirements of the proviso. But the proviso does not preclude a situation, for example, where the legal representative advises the accused that in his or her view, and in the interests of the accused, the trial should proceed without assessors. A court should not look behind a decision in a trial made by counsel in good faith and in the best interests of the client, save only to prevent a miscarriage of justice.⁵⁶ If the accused accepts that advice, the legal representative would advise the court that assessors are not required, and there would be compliance with the proviso. And in such a case, it cannot be suggested that ‘the accused never made a request [that the court] not sit with assessors’. Neither is it necessary for the record to reflect that the ‘legal representative explained the proviso to him’⁵⁷ – that is a given.

[61] The wording of the proviso is clear and unambiguous concerning the composition of the court, and the accused's entitlement to formally ask that the trial proceed with or without assessors. However, the interpretation of the proviso in *Langalitshoni* and *Nxumalo* produces a manifest absurdity. It is a settled principle that statutes should be construed to avoid absurdities or anomalous results.⁵⁸ Had the legal representative in both those cases informed

⁵⁵ *Matonsi* fn 19 at 456C-D.

⁵⁶ *GDB v Her Majesty The Queen* 2000 SCC 2002; [2000] 1 SCR 520 para 34.

⁵⁷ *Nxumalo* paras 9 and 10.

⁵⁸ *Venter v R* 1907 TS 910 at 915, affirmed in *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC) para 121, where Madlanga J, citing Innes CJ, said: ‘[W]hen to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into

the court that assessors *were* required, it would have been accepted that the proviso had been explained to the accused and that there was compliance with the requirements of the proviso. And in that scenario, it cannot be suggested, as the court in *Langalitshoni* found, that the question, ‘Are you going to use the services of assessors’, was ‘misleading’, because it did not convey to the accused the proper constitution of the court.⁵⁹ As stated, the legal representative would be aware of the proviso, would have advised the accused of its requirements, and neither the representative nor the accused could conceivably be ‘misled’. Why should the position be any different in the case where the legal representative informs the court that assessors are not required? In both scenarios the proviso requires no more than a formal request by the defence lawyer that the trial proceed with or without assessors.

[62] The decision in *Hlatshwayo* illustrates the point.⁶⁰ It does not appear from the judgment whether the accused were legally represented; it is assumed that they were. On 27 March 2018, during the pre-trial stage, the magistrate completed a pro-forma document forming part of the record and next to paragraph 1.14 thereof, it was indicated that both accused required assessors. That is the clearest indication that they understood the proviso; and there was no question about compliance with it. On 22 May 2018 the accused appeared before a different magistrate (who ultimately presided over the trial) and the case was remanded for trial. The following note was made on the record: ‘Both accused now indicate that they do not require assessors in this case’.⁶¹ At the commencement of the trial the magistrate did not deal with the proviso at all. The accused were convicted of murder and sentenced to 15 years’

account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the Legislature.’

⁵⁹ *Langalitshoni* para 11.

⁶⁰ *S v Hlatshwayo and Another* [2022] ZAKPHC 8 (28 March 2022).

⁶¹ *Ibid* para 4.

imprisonment. On appeal, the convictions and sentences were set aside because there was no compliance with the proviso.⁶²

[63] It appears from *Hlatshwayo* that the request by the legal representative, on behalf of the accused, that the trial proceed with assessors was accepted by the trial court. So too, a similar request was subsequently made that assessors were no longer required. That explains why it was unnecessary for the magistrate to again deal with the proviso prior to the commencement of the trial. The appeal court however followed *Langalitshoni* and *Nxumalo* in setting aside the convictions and sentences.

[64] I return to the facts of this case. The record shows that at the pre-trial conference, the respondent and his co-accused were legally represented. They were advised of the use of lay assessors, obviously sourced in the proviso, which requires the magistrate to be assisted by two assessors. The magistrate could not, and would not, have recorded that they understood that advice, unless it was explained to them. So, contrary to the high court's finding, the accused were directly involved in the explanation concerning the proviso. The magistrate went further. He asked the respondent's attorney to confirm that no assessors were required – essentially a confirmation of the accused's request – which the attorney provided. Thereafter, the record states, 'both accd confirm the same', meaning that they, in turn, confirmed the request to their attorney that the trial proceed without assessors.

[65] Subsequently, and prior to the commencement of the trial, the presiding magistrate's request to the respondent's attorney to again confirm that no assessors were required, was a belt-and-braces approach to the proviso. The attorney provided the requisite confirmation. On these facts, nothing can be

⁶² Ibid paras 14-16.

clearer than that the magistrate (and it may be accepted, the attorney) explained the proviso to the respondent; that he understood it; and that he requested that the trial proceed without assessors.

[66] It follows that the high court erred in holding that the trial court was not properly constituted. And its attempt to distinguish *Ngomane* on the basis that Bam J ‘appears to have entirely overlooked that in *Gayiya* the accused was also legally represented’, and that regardless of legal representation, the accused should still be informed of the proviso, must fail. The accused in *Gayiya* was unrepresented, and that is not what *Gayiya* holds.

[67] For the above reasons, the decisions in *Langalitshoni*, *Nxumalo* and *Hlatshwayo* are incorrect and should not be followed. The decision in *Zulu*⁶³ however, stands on a different footing. There, the trial court informed the accused of the proviso, after he had already pleaded. The appeal court correctly held that the magistrate was required to inform the accused of the proviso before the trial commenced. That was sufficient to set aside the conviction and sentence. However, the court’s endorsement of the approach in *Langalitshoni*, *Nxumalo* and *Hlatshwayo*, was incorrect.

[68] The appeal must therefore be upheld. I agree with the order issued.

A SCHIPPERS
JUDGE OF APPEAL

⁶³ *Busani Richard Zulu v The State* [2022] ZAKPHC 20 (13 May 2022).

Appearances

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