



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 179/2022

In the matter between:

LUFUNO MURAVHA

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

Neutral citation: *Muravha v Minister of Police* (179/2022) [2024] ZASCA 11 (30 January 2024)

Coram: MOCUMIE, CARELSE, HUGHES and GOOSEN JJA and TOKOTA AJA

Heard: 3 November 2023

Delivered: 30 January 2024

Summary: Civil procedure – record – lost civil trial record – reconstruction impossible – parties requesting court to hear appeal on the record as it stood (pleadings and judgment of the trial court only available) – an appeal court to be convinced that on the available record the trial court's conclusion on the facts was erroneous – appeal succeeds – matter to start *de novo* before another presiding judge.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makwela AJ with Semanya DJP and Muller J concurring, sitting as a court of appeal):

- 1 The appeal is upheld with no order as to costs.
 - 2 The order of the full court is set aside and replaced with the following order:
 - 'a. The matter is remitted to the trial court to start *de novo* before another presiding judge.
 - b. Costs are reserved.'
-

JUDGMENT

Carelse JA (Mocumie, Hughes and Goosen JJA and Tokota AJA concurring):

[1] This case concerns a lost record of a civil trial. The appellant, Mr Lufuno Muravha (plaintiff in the trial court) unsuccessfully sued the respondent, the Minister of Police, for the sum of R900 000.00 in the Limpopo Division of the High Court, Thohoyandou (the trial court). The trial court (per Phatudi J) dismissed the appellant's claim with costs, and subsequently refused leave to appeal.

Proceedings in the trial court

[2] The record of the trial proceedings was lost in its entirety and was not reconstructed at the time of the hearing of this appeal. I will return to the question of the lost record later on in the judgment. The following evidence can be gleaned from the judgment of the trial court. The appellant and the respondent each led the evidence of two witnesses.¹ It was common cause that the appellant was shot by a

¹ The judgment of the court a *quo* page 81 and 82 stated as follows:

'[6] The plaintiff testified that on the 08 August 2014, there was unrest in and around the surrounding villages at Phadzhima Dzumba-Thoho, Limpopo Province. He had a motor car scrapyards workshop and cash loan business operating at the workshop premises situated at Phadzhima-Madzhadhani,

member of the South African Police Service (who was acting in the course and scope of their employment). The shooting took place at his motor car scrapyards workshop. The appellant said that a number of protesters ran into his business premises, followed by the police. He tried to push the protesters out of his business premises. During the commotion, he was shot by a member of the police with a rubber bullet. The appellant denied that he was part of the protest action and that he pelted stones at the members of the police.

[3] On the other hand, according to the summary of the evidence by the trial court, the respondent's witnesses disputed the place where the shooting took place. According to the police they were requested to deal with the protest action. The police said that the road near 'Mampa's place' was blockaded with scrap metal. At this place the police were ordered to shoot 'rubber bullets' at the protesters because police lives were in danger.²

Limpopo Province. He kept a number of people's motor vehicles brought for repairs at the workshop premises. He at or around 19h30 saw a group of people come running and screaming into his workshop. He stopped what he was doing and went to "push" the said people out of his workshop. While "pushing" the people out of his workshop, a big police Motor vehicle (Nyala) appeared. It stopped in front of the workshop. Two police alighted, stood on the ground and pointed their firearms towards the said people who came running into his workshop. The police fired shots towards the people. He was hit by one rubber bullet. He informed Netshituka who was with him that he had been shot at. Netshituka informed the police what they just did. The police then said "sorry". They thereafter board inside Nyala and drove off.

[7] He conceded during cross-examination that the police would not have easily differentiated him from the strikers or people who came running into his workshop because he was approximately 4 meters behind those people. He however, denied to have been part of the people who pelted the police with stones.

[8] Samuel Netshituka (Netshituka) who was with the plaintiff at the time of the incident, corroborated the plaintiff's evidence in as far as the number of protesters who came running into the workshop. He testified that he was assisting the plaintiff to "push out" those who ran into the workshop when a big police motor vehicle (Nyala) came and became stationary alongside the plaintiff's workshop gate. The said Nyala was approximately 150 meters away from the workshop as opposed to 200 meters as testified to by the plaintiff. He as well estimated the distance between the protesters who were in the yard and them to have been approximately 4 meters when they were "pushing them out of the yard".

² [9] Captain Milingoni Mudau (Mudau) testified in rebuttal to the plaintiff's version that she and six other Public Order Police (POPS) (she referred that as a 'section') were in a big marked police motor vehicle restore order at Phadzhima. They were informed that protesters are heading to Ms Mampa's residence and SAPS satellite office. They went to the area. They found the road being blockaded with big stones, big blocks of wood/trees, burning tyres and other objects. On their arrival at the villages, a number of protesters started to pelt stones at them.

[10] She used a loud speaker to inform the protesters who they were and their purpose being to restore order. She ordered them to disperse. The protesters resisted. She ordered her section to use "illuminating Para" to illuminate light within the circumference of the area they were at because it was already dark. Protesters started to 'run' off while others pelted stones at them. They proceeded driving towards Mampa's residence. They, at the off ramp on their way to Mampa's residence, found the road blockaded with a scrap of a motor vehicle, big stones and other objects. They used Nyala's scrapper affixed to its front to remove some of the stones and the scrap of a motor vehicle off the road. The situation became worse. Protesters pelted stones at them. She ordered her section to use "stan-

[4] The location where the shooting took place and whether or not the appellant was part of the protesters were strongly disputed. Because of these disputes the trial court accepted that the appellant and the respondent's versions were mutually destructive, and in dealing with the disputed facts the trial court applied the well-known principles on conflicting versions set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and Others*.³ The trial court accepted the version of the respondent's witnesses and, after considering the probabilities in the case, dismissed the appellant's claim with costs. On petition to this Court on 27 October 2017,⁴ leave to appeal was granted to the Full Court of the Limpopo Division of the High Court, Polokwane (the full court) against the dismissal.

Proceedings before the full court

[5] In preparation of the appeal before the full court, the appellant discovered that the entire trial record was lost. The timeline bears mention. The notice of appeal was only filed on 14 March 2019, some 17 months after leave was obtained. It is not disputed that on 26 November 2020, some two years and eight months later, the record of appeal which included the pleadings, the judgment and order of the high

grenade" to disperse protesters, because their lives were in danger. They managed to remove the objects used to blockade the road and manage to proceed to Mampa's place.'

³ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and Others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para 5 states as follows:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

⁴ On petition before Leach JA and Rogers AJA.

court was filed. Notwithstanding the missing record, on 14 May 2021, the full court (per Makwela AJ with Semenya DJP and Muller J concurring) heard the matter and, on 19 October 2021, dismissed the appeal.

[6] It is not disputed that the appellant did not file its notice of appeal and the trial record in terms of rules 49(2) and 49(6)(a).⁵ The full court granted the appellant condonation for the late filing of its notice of appeal and the late filing of the pleadings as well as the judgment of the trial court. On the question of the missing record, the full court, without stating what steps the appellant took to obtain the missing record, held that the appellant was not the custodian of the record and that he did everything within his power to secure the records from the custodian and should not be punished for something that is beyond his control. For these reasons, the full court proceeded to hear the appeal.

[7] In its notice of appeal, the appellant contended that the trial court misdirected itself in the following instances: when it failed to decide the matter on the pleaded ground that the respondent's employees intentionally assaulted him; pertinently, the appellant complained that the trial court misdirected itself on the facts, on the probabilities and on the issue of costs.

[8] The appellant did not amend his notice of appeal to include the added difficulty of the missing record. The trial record was missing as far back as 26 November 2020. During argument the appellant submitted that he would not receive a fair trial, since the trial record was missing. In its judgment on the record the full court stated:

⁵ Rule 49(2) of the Uniform Rules of Court provides that:

'If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.'

Rule 49(6)(a) of the Uniform Rules of Court provides that:

'Within 60 days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within 10 days after the expiry of the said period of 60 days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.'

'The issues raised in this appeal are narrow. The appellant challenges the trial's court alleged failure to deal with the matter on the pleaded facts of intention. Furthermore, *the appellant and the respondent seem not to be dissatisfied with the trial court's summary of the facts*. It is on this basis that I find that the appeal court may proceed with hearing of the appeal on what has been placed before it. This will not in any way affect the appellant's right to [a] fair trial.' (My emphasis.)

This finding that the appellant and the respondent agreed with the trial court's summary of the facts is dealt with below.

[9] In the summary of facts by the trial court, it is apparent that at issue was the location where the shooting took place. The trial court recorded that the appellant's evidence was that members of the police were in a Nyala police vehicle, approximately 200 metres from him and 4 metres from the protesters when he was shot. Whereas the appellant's witness stated that members of the police were 150 metres away when the appellant was shot. The trial court relied on this evidence, which is disputed, in order to make its probability findings. It is not clear whether the trial court considered the reliability of the appellant and his witness's evidence in respect of their observations. The shooting took place at night. As to the distance, it is not clear whether the trial court tested the accuracy or veracity of the appellant and his witness's observations in this regard.

[10] Without the record (evidence in chief, cross-examination and re-examination), the full court would not have been in a position to determine: whether the appellant's and/or his witness's version on this issue was disputed; the location of the shooting and whether the appellant was one of the protesters. The record of this evidence was necessary before the full court could determine the outcome of the appeal. It is also not clear whether there was a concession on the facts, because the grounds of appeal unequivocally state that, '[t]his court should interfere with the high court findings of facts [for the following reasons]. The High Court committed a misdirection [in] its finding that the Appellant testified that the Police were 150 metres away from where he was. The Appellant's evidence was that his workshop is 200 metres from the tar road not that the police where 150 metres away from where he was at the time of the shooting'. (Original underlining.)

[11] According to the full court, the appellant and his witness' evidence were 'so diametrically opposed that I am not in a position to reconcile the two. Appellant testified that he was +/- 4 metres away when he was shot whilst his witness testified about the distance of 200 metres'. This summary of the facts by the full court was not in line with the trial court's summary.

[12] The full court dismissed the appeal with no order as to costs. Aggrieved by the dismissal, the appellant sought special leave to appeal to this Court, which was granted to him on 11 February 2022.⁶

Proceedings in this Court.

[13] In his notice of appeal to this Court, the appellant sought the following relief *inter alia*: that the appeal be upheld; that the respondent be held liable for damages that the appellant may prove; alternatively, that the matter be remitted to the high court for re-hearing, to start *de novo* before another presiding judge. On 4 April 2023, before this Court, the appeal was set down for hearing. Because it was not clear what steps the appellant took to reconstruct the record, this Court was not satisfied that there had been compliance with the guidelines set out by the Constitutional Court in *Schoombee and Another v S*.⁷ This Court consequently granted the following order:

⁶ Before Zondi JA and Weiner AJA.

⁷ *Schoombee and Another v S* [2016] ZACC 50; 2017 (5) BCLR 572 (CC); 2017 (2) SACR 1 (CC) paras 19-21:

'Reconstruction of a trial record

[19] It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record "is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside".

[20] If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial process". Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required.

[21] The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, "both the State and the appellant have a duty to try and reconstruct the record". While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative "carries the final responsibility to ensure that the appeal record is in order". At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent.'

‘1 The matter is postponed sine die with no order as to costs.

2 The parties are directed to attend to the reconstruction of the record of the civil trial proceedings under Limpopo Division (Thohoyandou) Case Number 547/2015 (A M L Phatudi J) to the extent that is necessary and capable of reconstruction in line with the guidelines . . . in *Schoombee* . . .

. . .

4 Counsel for the parties is hereby directed to immediately take steps to have the record of this matter reconstructed and submit the report to this Court (SCA) within 90 (ninety) days from the date of this order.

5 If the record is not capable of reconstruction notwithstanding the efforts set out in paragraphs 3 and 4 above, the parties are to file a joint report to that effect . . .’

[14] The appeal was re-enrolled for hearing on 3 November 2023 before this Court. A report setting out the steps that the appellant and the respondent took to reconstruct the record some five years later was submitted. The following was stated in the report:

‘. . .

2. On the 25th of April 2023, at the Chamber of Justice AML Phatudi, the parties’ legal representatives held a meeting before Justice AML Phatudi to comply with this Court Order.

3. In the above-mentioned meeting, it was agreed that the Registrar of the High Court, Mrs Mavhungu will take necessary steps of ensuring that the reconstruction of the High Court proceedings is retrieved from the service provider and transcribe such record on or before the 15th of May 2023.

4. The Registrar of the High Court attempted without any success to obtain recording of trial proceedings under High Court case number 547/2015. As proof, the affidavit of the Registrar of the High Court is attached hereto as annexure “A”, as well as the letter from the ICT technician, Ms H Lidiavhathu marked annexure “B”.

5. On the 22nd of June 2023, the parties through their legal representatives (Mr SO Ravele and Adv BF Gededger) held their second meeting at Justice AML Phatudi’s Chambers, where the following was agreed upon:

5.1. The parties have given attention to paragraphs 4 and 5 of this Court as well as the guideline set out by the Constitutional Court in *Schoombee and Another v S* [2016] ZASCA 50; 2017 (5) BCLR 572 (CC); 2017 (2) SACR 1 (CC) para 20.

5.2. Since the transcribe record of the proceedings of the High Court has gone missing and the parties’ counsel and the presiding Judge (court a quo) no longer have the notes of the proceedings, reconstruction has proved impossible.

5.3 The parties are of the view that calling witnesses to depose to affidavits under the circumstances where both the record of the High Court proceedings and notes of the presiding Judge and counsel of the parties are not available, will amount to [a] retrial of the matter without leave of the Supreme Court of Appeal.

5.4. The parties agree that this is a case where the transcribe record has gone missing and the presiding Judge and counsel of the parties have made all attempts to reconstruct the record without any success; and

5.5. The parties agree that what remains is for the Supreme Court of Appeal to consider the circumstances detailed above, give direction and/or make a ruling having had regard of the fact that [the] transcribed record has gone missing and there has been a proper attempt(s) to have the record reconstructed, which has proved impossible.'

[15] In a very short affidavit, the registrar of the high court stated that according to the ICT Technician, the recordings of the court proceedings could not be retrieved. This affidavit was followed by a report indicating that the recording was done on the old DCRS machines, which have been decommissioned, as a result of which the recordings could not be retrieved. No further explanation was forthcoming. The parties accepted the outcome and did nothing further.

[16] The attempts by the parties to retrieve the record are unsatisfactory. The appellant accepted the explanation that the record was missing and reiterated in this Court that the trial court misdirected itself on the facts. It is clear that there is no consensus on the facts. In *JMYK Investments CC v 600 SA Holdings (Pty) Ltd*,⁸ the court held:

'[5] It is the plaintiff's submission that the appeal cannot be heard on the record before this Court. But a party has a statutory right to appeal: *Beaumont v Anderson* 1949 (3) SA 562 (N). In that matter the plaintiff's evidence-in-chief was lost. The court remitted the matter to the magistrate to re-hear that evidence. The defendant has not asked us to give a similar order, but has asked us to hear the appeal on the record as it stands.

[6] In *Engelbrecht v Nieuwoudt* 1941 CPD 54 Davis J (Howes J concurring) said at 55: "(T)he record in the magistrate's court does not purport to reproduce the *ipsissima verba* of the witness; it does not give questions and answers in the exact words in which the question was put and the answer made; it, at best, gives no more than a summary, and, that being so, the Court of Appeal is at an even greater disadvantage that it would be with a record before

⁸ *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W).

it which was an exact transcription of everything that was said in the lower court. It consequently becomes all the more dangerous to attempt to fasten on an odd phrase here or some few words there when one does not know the precise words used in the answer and, what is of equal importance, one does not know the question which elicited that answer.”

We are at a still greater disadvantage.

[7] There was no misdirection on fact by the magistrate. Therefore, there is a presumption that the magistrate's conclusion is correct; and before the defendant can succeed on appeal, we have to be convinced on this record that the conclusion reached by the magistrate is wrong. In case of doubt, the magistrate's conclusion must be upheld: Rules 8 and 9 in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706.’

[17] In this case, there is no evidence. After five years, I am not surprised that the presiding officer of the high court no longer has his notes. For the appellant's legal representative and the State's legal representative not to have any notes of the trial proceedings, is implausible. More so, the appellant's legal representative must have known that the appellant intended to appeal and the sensible and responsible thing would have been to ensure the safekeeping of their notes. The failure by the appellant and the respondent's legal representative to keep notes of the proceedings well-knowing that an appeal is looming is in our view a dereliction of duty.

[18] In *Unitrans Fuel and Chemical v Dove-Co Carriers*,⁹ the court held:

‘Litigants in our civil courts have no choice but to utilize the transcribers, contracted to the Minister of Justice, and although not party to that contract, they undoubtedly have the necessary *locus standi* to bring an application to compel them and/or the Minister of Justice to provide the transcripts, in the event of their defaulting on their contractual obligations.’

This was not done. Again, if efforts to secure the record were made timeously, we would not have reached this stage where the record of the trial was missing in its entirety.

[19] It is clear that the full court laboured under the incorrect assumption that the facts were not in dispute. Both in this Court and in the appellant's notice of appeal, he contended that the trial court misdirected itself on the facts. The appellant persisted with his contention that the trial court misdirected itself on the facts. When

⁹ *Unitrans Fuel & Chemical (Pty) Ltd v Dove-Co Carriers* CC 2010 (5) SA 340 (GJ) para 30.

there is a challenge to the factual findings on the record, it is trite that an appeal court will not interfere with the factual findings of a trial court unless the trial court seriously misdirected itself on the facts.¹⁰ To establish this, an appeal court has to consider the trial court proceedings. In the absence of the trial record this is not possible.

[20] To come to a conclusion on the disputed issues, the full court had to look at the record of the proceedings in order to evaluate whether the trial court misdirected itself on the facts. The full court's reliance on the trial court's summary of the facts and then on the basis that the 'appellant and respondent seem not to be dissatisfied with the trial court's summary of the facts', is not borne out by the appellant's contentions in this Court and his notice of appeal. As a result, a serious misdirection on the part of the full court has occurred. The full court wrongly decided the matter without the record of the trial proceedings. In terms of s 34 of the Constitution the appellant was entitled to a fair trial. Without the record in this case, it cannot be said that the appellant had a fair trial. Unfortunately, the consequence hereof must be to remit the matter to the trial court for a re-hearing before another presiding judge as credibility findings were made by the trial court.

[21] Because of the lacklustre attempt at compliance with the court rules and the inordinate delay in this matter from both the appellant's and the respondent's legal representative, each party should pay its own costs in the appeal. None of the parties sought costs for the previous hearing in this Court when the proceedings were adjourned for the parties to secure the trial record.

[22] In the result, the following order is made:

- 1 The appeal is upheld with no order as to costs.
- 2 The order of the full court is set aside and replaced with the following order:
 - 'a. The matter is remitted to the trial court to start *de novo* before another presiding judge.
 - b. Costs are reserved.'

¹⁰ *Bogaards v S* [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC); *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA). See also *Monyane and Others v S* [2006] ZASCA 113; 2008 (1) SACR 543 (SCA) para 15.

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JUDGE OF APPEAL

Appearances

For the appellant: S O Ravele
Instructed by: SO Ravele Attorneys, Louis Trichardt
Phatshoane Henney Attorneys, Bloemfontein

For the respondent: B F Gededger
Instructed by: State Attorney, Thohoyandou
State Attorney, Bloemfontein