

A361/05

**THE HIGH COURT OF SOUTH AFRICA**  
**TRANSVAAL PROVINCIAL DIVISION**

DATE: 24/3/05

NOT REPORTABLE

**Magistrate:**

**PRETORIA**

**Review Case no.: 61/1301/2003**

**High Court Ref no.: 4968**

**THE STATE V SELLO LIFE RAHLAGANE**

**REVIEW JUDGEMENT**

**DOLAMO AJ**

[11] This matter came before me by way of special  
**review. The Magistrate is seeking direction  
regarding the disposal of a matter which is  
pending before him.**

(2) The reason for requesting this court to give  
**direction appears from the letter by the presiding officer  
dated the 5<sup>th</sup> day of September 2004, in which it is  
stated that "the whole record went  
missing before I could give judgment".**

(3) It appears from other documents accompanying  
**this letter that the accused in this matter**

appeared in the magistrate's court on one count of assault with intent to do grievous bodily harm. The copy of the court book reflects that he appeared on the 17<sup>th</sup> August 2004 and the matter was remanded to 8<sup>th</sup> October 2004 pending a special review by this court.

- [4] It is not stated what was the accused's plea nor is it clear at what stage of the proceedings did the record go missing.
- [5] From what is stated in the Presiding Officer's letter I initially gained the impression that the charge sheet, annexures and the "whole of the record", which I assume was mechanically recorded, were missing. But on reading the letter of the accused's legal representative and that of the Prosecutor, who appeared on behalf of the state in the matter I am satisfied that only the charge sheet, annexures and some of the tapes (used in the mechanical recording of the proceedings) are missing. The affidavit of the clerk of the court, disposed to on the 20<sup>th</sup> October 2004, to the effect that it was only the charge sheet under case no 61/1301/2003 which was not received back from court P on the 17<sup>th</sup> August 2004, though it lends support to the conclusion that only parts of the record and the charge sheet are missing, is somewhat confusing. It is

confusing because on the 17th August 2004, the date on which he did not received back the charge sheet, is the date on which the matter was remanded to 8<sup>th</sup> October 2004 pending review of the matter by this court. It is obvious, from the entry in the court book that by the 17th August 2004 the problem had already arisen because on that date the Magistrate postponed the matter to the 8<sup>th</sup> October 2004 for a review of the proceedings. Be that as it may, it does not detract anything from my conclusion that only parts of the record are missing.

- [6] The authorities are clear regarding the steps to be taken in the event of the record, or parts thereof, being lost or missing. In *S v Ntantiso and Others* 1997 (2) SACR 302 (ECD) at 304 (h-j) Mphati J (as he then was) stated the following:

*"It does not seem to me that sufficient efforts have been made in an attempt to reconstruct the record The magistrate, prosecutor and interpreter are not the only persons who can be approached in order to obtain 'the best available secondary evidence' referred to in the cases mentioned above. The phrase 'other persons present in court' includes, in my*

*view, the accused and other persons who may assist in the reconstruction of the record. Furthermore, the prosecutor has not said that he is unable to assist in the reconstruction of the record, but simply has not responded to calls to assist .....*"

- [7] It appears to be the common view that where the record is capable of reconstruction efforts must be made to do so before resorting to the drastic measure of starting the trial de novo.
- [8] The procedure to be followed in reconstructing the record is also clear from the authorities. This has been captured in *S v Seleke* 1978(1) SA 993 (T) at 994 B in the following terms:

"(a)

*(b) the clerk of the criminal court should obtain the best available secondary evidence and place it before the reviewing Judge with a report;*

*(c) in obtaining such secondary evidence, the clerk of the court should approach those of the witnesses whose evidence is defective and others who were present at the trial (as, eg, the magistrate, the prosecutor or the*

*interpreter) to obtain from them, on affidavit, proof of what the record contained. He should give both the accused and the State an opportunity to peruse what he had assembled. ....* N

- [9] In this case there is no indication that the record is not capable of reconstruction. All indication are that such a reconstruction is possible. The Magistrate; prosecutor, interpreter and the legal representative of the accused are all available to assist in the reconstruction of the record. Furthermore from the facts placed at my disposal, it appears that not the whole of the record is missing. The presiding officer, it seems, was not appraised by the officials involved of the full circumstances. I am not suggesting any sinister motive for not doing so. It may be due to ignorance of the full implications of stating in general terms that a record of the proceedings is missing.

[10] In the result I make the following order:

1. The matter is returned back to the clerk of the court, Magistrate Court Pretoria, with instruction that (s)he obtain the best secondary evidence of the contents of that part of the record which is missing and in accordance with the applicable principle to reconstruct the record;
2. The Magistrate, the Interpreter, the Prosecutor and the Accused's legal representative are all enjoined to assist in the reconstruction;
3. This exercise must be commenced and finalised without any further undue delay.
4. Thereafter the reconstructed record must be placed before the Magistrate so as to enable him to finalise the matter.

M. J. DOLAMO  
ACTING JUDGE OF THE HIGH COURT

I agree.

J. B. SHONGWE  
JUDGE OF THE HIGH COURT

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