



NORTH WEST HIGH COURT

HIGH COURT REF: 1/11 & 2/11

In the matter between:

THE STATE

and

- 1. TUMELO ERNEST BALOYI**
- 2. LAWRENCE TSHABALALA**

REVIEW JUDGMENT

KGOELE J.

- [1] These two matters served before me by way of an automatic review.

- [2] Queries couched as follows were sent to the presiding officer in respect of each of them:-

TUMELO ERNEST BALOYI

- “[1] According to the explanation you made on the 24/11/2010, some parts of the transcribed record are missing. Unfortunately the explanation you have submitted does not suffice to help me deal with this matter.*
- [2] If a record is missing, an attempt to “reconstruct the record of the proceedings” should be made ito **S v Joubert 1991 (1) SA 119 (A).***
- [3] The matter is therefore referred back so that the record can be reconstructed in the following manner:-*
- “(i) The clerk of the court should place before the reviewing Judge the best secondary evidence he can of the contents of the original record. There is no need to subpoena the witnesses nor compel the accused to attend, but he can approach the witnesses, the presiding officer, the prosecutor and others who were present at the trial, to obtain from them an affidavit about what the contents was of the evidence that was led and the proceedings that took place as well as the plea.*
 - (ii) The clerk of the court should further submit such reconstructed record and affidavits to the accused to obtain from him/her consent that the record has been correctly reconstructed. An affidavit from the accused as to the correctness or otherwise of the reconstructed record should also be obtained and forwarded with the matter to the reviewing Judge.*
 - ((iii) Should the clerk of the court encounter any problems in as far as the directions in 3 (i) and 3(ii) above, an **affidavit from him, the accused, and all other witnesses or people who were present during the proceedings to the effect that they cannot assist in any matter should be furnished.**”*

LAWRENCE TSHABALALA

“[1] According to the explanation you made the following are missing in this matter:-

- a) accused's case
- b) accused and States address
- c) Judgment

[2] In terms of ***S v Joubert 1991 (1) SA 119 (A)***, if a record is missing, a proper attempt to reconstruct the record of the proceedings should be made.

[3] The matter is therefore referred back so that the record can be reconstructed in the following manner:-

- “(i) The clerk of the court should place before the reviewing Judge the best secondary evidence he can of the contents of the original record. There is no need to subpoena the witnesses nor compel the accused to attend, but he can approach the witnesses, the presiding officer, the prosecutor and others who were present at the trial, to obtain from them an affidavit about what the contents was of the evidence that was led and the proceedings that took place as well as the plea. (In this matter only the parts that is missing should be reconstructed).
- (ii) The clerk of the court should further submit such reconstructed record and affidavits to the accused to obtain from him/her consent that the record has been correctly reconstructed. An affidavit from the accused as to the correctness or otherwise of the reconstructed record should also be obtained and forwarded with the matter to the reviewing Judge.
- ((iii) Should the clerk of the court encounter any problems in as far as the directions in 3 (i) and 3(ii) above, an **affidavit from him, the accused, and all other witnesses or people who were present during the proceedings to the effect that they cannot assist in any matter should be furnished.**”

[3] When the reply was received from the presiding officer who

happened to be the same in the these matters, it became apparent from the affidavits supplied by the clerk of the court that all attempts to reconstruct the missing record in both matters were done but proved fruitless.

[4] This court is therefore unable to, without a reconstructed record of proceedings, make an informed decision as to whether the proceedings in the court *a quo* appears to be in accordance with justice or not.

[5] Consequently the following order is made:-

5.1 The proceedings in these two matters are set aside.

A.M. KGOELE
JUDGE OF THE HIGH COURT

I agree

N. GUTTA
JUDGE OF THE HIGH COURT

DATED: 23/02/2012

A.M. KGOELE
JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS
JUDGE OF THE HIGH COURT

DATED: 10/03/2011