



DISCUSSION PAPER 171

**ENSURING THE CONTINUITY OF CRIMINAL TRIALS:
REFORMING THE “DE NOVO” RULE AND COURT
RECORD MANAGEMENT IN SOUTH AFRICA**

**PROJECT 151: THE REVIEW OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977
(A SUB-PROJECT OF THE REVIEW OF THE
CRIMINAL JUSTICE SYSTEM)**

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INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

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PREFACE

This discussion paper has been prepared to elicit responses from various stakeholders and interested members of the public and to serve as a basis for the Commission's deliberations during its consultative process on the discussion paper. Following an evaluation of the responses and any final deliberations on the matter, the SALRC will issue a report on this subject, which will be submitted to the Minister of Justice and Constitutional Development.

The views, conclusions and recommendations in this paper are not the final views of the Commission. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focused submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents unless representations are marked "Confidential". Respondents should be aware that the SALRC may, in any event, be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations.

Respondents are requested to submit written comments or representations on the Discussion Paper to the SALRC by no later than 31 March 2026. Comments can be sent by email or post. However, comments by email are preferred.

ABBREVIATIONS AND ACRONYMS

| | Acronym | Explanations |
|-----|----------------|---|
| 1. | AVR | Audio-Visual Remand |
| 2. | CJS | Criminal Justice System |
| 3. | CJSR | Criminal Justice System Reform |
| 4. | CPA | Criminal Procedure Act |
| 5. | CPR | Criminal Procedure Reform |
| 6. | CRAVS | Court Recording Audio-Visual Solution |
| 7. | CRT | Court Recording Technology |
| 8. | DCRS | Digital Court Recording System |
| 9. | DOJ&CD | Department of Justice and Constitutional Development |
| 10. | ICMS | Integrated Case Management System |
| 11. | JSC | Judicial Service Commission |
| 12. | NARSSA | National Archives and Records Service of South Africa Act |
| 13. | NPA | National Prosecuting Authority |
| 14. | SALRC | South African Law Reform Commission |
| 15. | SAPS | South African Police Service |
| 16 | SCA | Supreme Court of Appeal |

TERMINOLOGY

In accordance with the principles of plain language drafting, Latin expressions are to be minimised where clear and accessible English equivalents exist. Therefore, the term "trial *de novo*" will be substituted throughout this discussion paper with alternatives such as "trial anew," "trial afresh," or "retrial." These English expressions will be used interchangeably to improve linguistic flow while consistently conveying the concept of a complete rehearing of a case. The Latin phrase "trial *de novo*" will be used solely where the context requires, such as in direct quotations, formal legal citations, or when referencing specific statutory language.

EXECUTIVE SUMMARY

1. This document presents a comprehensive analysis of deficiencies (legislative, technological, and administrative) within the South African criminal justice system that prevent the continuation of part-heard criminal trials by a new presiding officer. To ensure this analysis adheres to plain language drafting principles, the Latin expression "trial de novo" has been replaced throughout this paper with English equivalents such as "trial anew," "trial afresh," or "retrial," except where the context requires its use. These expressions are used interchangeably to describe the default legal requirement that proceedings must start from the beginning when a judicial officer becomes unavailable (e.g., due to death, ill-health, resignation, retirement, recusal, or suspension) before delivering a verdict and is unable to resume the trial within a reasonable time. However, the reform of this rule is shown to be entirely dependent on solving a related challenge: the systemic failures in court record management.

2. The trial anew rule, while intended to safeguard the principle that a judicial officer must personally observe and hear the evidence presented in order to evaluate the demeanour of witnesses and assess their credibility, entails significant and prejudicial consequences. It directly conflicts with the accused's right to have their trial begin and conclude without unreasonable delay; it "resets the clock," thereby adding months or years to the prosecution process; and it imposes substantial financial burdens on both the State and the accused, who may have already incurred considerable legal expenses and will be compelled to do so again. Furthermore, it prolongs the agony for the victim's family and necessitates witnesses to testify again, thereby subjecting them once more to the trauma of recounting the same evidence.

3. The analysis highlights a critical gap in the Criminal Procedure Act (CPA), 51 of 1977, specifically noting that while section 275 allows an accused to be sentenced by a judicial officer other than the one who convicted him or her, no similar provision exists for a judicial officer to take over a part-heard trial prior to delivering a verdict on the guilt of the accused. This gap exists because the new judicial officer is unable to personally assess the demeanour and credibility of witnesses they did not observe testify.

4. The analysis contrasts the South African legal system with the flexible systems observed in other jurisdictions. India, Kenya, and Tanzania each possess statutory provisions that confer discretion upon judicial officers. They may consider the evidence documented by their predecessor or, if deemed necessary, recall specific witnesses for further examination.

The United States of America permits a new judge to conclude a trial provided that they certify their familiarity with the trial record.

5. To close the legislative gap within the CPA, the Commission recommends the inclusion of a new provision in the CPA to address cases where a presiding judicial officer becomes unavailable before a verdict is delivered. This provision empowers heads of courts with a crucial discretion. They may direct the trial to continue before a new judicial officer, provided the original judicial officer is unable to resume the trial within a reasonable time and the new officer is satisfied that:

- the demeanour of the witnesses can be determined from the record of proceedings;
- witnesses who already testified are available to be re-summoned; and
- the record of proceedings from the previous trial is complete and legible.

Alternatively, the head of court may refer it to the National Director of Public Prosecutions to begin the trial anew.

6. In exercising this discretion, the provision requires heads of courts to consider key circumstances, including:

- the potential for memory loss among witnesses who have already testified;
- the time that has passed since the commencement of the trial;
- the potential prejudice to either the prosecution or the accused if the trial commences anew; and
- the impact of a retrial on the accused's right to have his or her trial begin and conclude without unreasonable delay.

7. Additionally, the proposed provision stipulates that if the trial is continued before a new judicial officer, the record of proceedings from the initial trial forms part of the record of proceedings before that officer.

8. As a preventative measure, the Commission recommends a top-down regulatory approach under Section 8 of the Superior Courts Act, 10 of 2013, to ensure that all cases assigned to judicial officers are finalised prior to their retirement. The Chief Justice should set a national standard by issuing a directive to all Judge Presidents who must then issue specific Practice Directives for their respective Divisions, detailing the measures necessary to ensure judicial officers finalise all assigned cases before retirement. As the coordinating authorities for the lower courts, Judge Presidents must ensure these directives are mirrored and enforced by Regional Court Presidents and Chief Magistrates.

9. The DOJ&CD is in the process of implementing the Court Recording Audio-Visual Solution (CRAVS) to replace the outdated Court Recording Technology (CRT). This new technology will allow parties in a case to appear via video link, facilitating virtual legal processes such as appearances, remands, testimony, and trials. It will enable real-time automated transcriptions of court proceedings and support AI-driven language interpretation.

10. The Commission welcomes the implementation of the CRAVS system, as it will greatly contribute to ensuring that the demeanour of witnesses during their testimonies in court is captured for future reference. It urges the DOJ&CD to expedite the implementation process in light of the current challenges that hinder trials from proceeding from where a previous presiding officer left off, resulting in trials having to start afresh. Moreover, given the significance of capturing a witness's demeanour in the trial court, the Commission suggests that the introduction of video recording equipment in courts should commence in the magistrates' courts. Furthermore, the Commission recommends that the Digital Court Recording System (DCRS) clerks undergo comprehensive training on how to operate the CRAVS system correctly.

11. Any reform to continue part-heard trials is contingent on a complete, legible and accessible record of proceedings. However, the administration of justice is critically undermined by persistent challenges related to poor record management. Many courts still rely on old recording systems that are prone to malfunction. Mechanical failures in recording devices, such as malfunctioning microphones and recording equipment, have resulted in the loss of crucial testimonies. There is also a systemic risk that records can go missing due to deliberate interference and administrative negligence. Furthermore, while the High Courts are implementing Court Online (an end-to-end e-filing, digital case management and evidence management system), the Magistrates' Courts still rely on the unstable and outdated Integrated Case Management System (ICMS). To address these foundational failures, the Commission proposes a comprehensive, multi-layered strategy:

- **Standard Operating Procedures for Clerks:** The duties of DCRS clerks must be elevated from administrative guidelines to binding Rules of Court, with mandatory training and disciplinary consequences for non-compliance.
- **Safeguarding judicial Notes:** The Chief Justice should issue a directive mandating that all judicial handwritten "bench notes" be securely retained by the court manager for at least five years. These notes are critical secondary evidence for reconstructing lost or incomplete records.

- **Standardised record management policy:** The Minister should be mandated to develop a comprehensive standardised record management policy for the lower courts. The policy should establish clear procedures for managing paper and electronic court records. It should cover all aspects of court records management throughout their life cycle, including record creation, media types, record integrity and preservation, storage, records security and safety, backup systems, tracking and tracing, audit inspections and trails, disaster recovery plans, and training of record management staff. The proposed record management policy should be based on the guidelines for the compilation of a records management policy contained in Annexure 4 of version 1.4 of the Records Management Policy Manual, published by the National Archives and Records Service of South Africa in October 2007.

CHAPTER 1: BACKGROUND

A Context of the Investigation

1.1 Since 1996, several programmes and initiatives have been developed to ensure the establishment and maintenance of a transformed, efficient, effective, victim-friendly and modernised criminal justice system (CJS) for South Africa. Key among these initiatives are the National Crime Prevention Strategy of 1996, as a vehicle to transform and align the CJS to the new democratic dispensation; the Seven Point Plan of 2008, which listed seven fundamental transformative measures in recognition that the CJS in South Africa was performing sub-optimally and needed to change; the National Development Plan: Vision 2030 of 2012 that outlines a roadmap for the transformation of society; and the adoption of Outcome 3 of the Medium Term Strategic Framework (2014-2019), “All People in South Africa are, and feel safe”.

1.2 In 2017 Cabinet approved a broad framework for the development of an Integrated Criminal Justice Strategy to promote a transformed, efficient, effective and modernised integrated CJS, the result of which was the Integrated Criminal Justice Strategy for South Africa of 2019 (the ICJS). This document sets out several strategic goals of which Legislative Reforms is Strategic Goal 1. The Implementation Plan for the ICJS proposes that the overhaul of the Criminal Procedure Act 51 of 1977 (CPA) be implemented in a phased manner. However, the immediate focus should be on determining the critical weaknesses of the CPA and its Regulations.

1.3 On 26 August 2020, the then Minister of Justice and Correctional Services, Mr Ronald Lamola (MP), requested the Chairperson of the SALRC to include, on an urgent basis, the review of the CJS in the SALRC’s research programme. Under the cover of a letter dated 31 March 2021, the Minister submitted the terms of reference for the review to the Commission. The review was included in the SALRC’s research programme under Project 151. In view of the urgency to reform the CPA, the SALRC is following a two-pronged approach in executing the review. First, the reform of the CPA is being dealt with in terms of an accelerated process under the Criminal Procedure Reform (CPR) Project, a sub-project of the broader Criminal Justice System Reform (CJSR) Project. Both of these processes are part of Project 151.

1.4 As part of the accelerated process, the Department of Justice and Constitutional Development (DOJ&CD) and the SALRC hosted consultative stakeholder workshops on 23 June 2023 and 21 – 22 September 2023. The purpose of the workshops was to gather insights from stakeholders on the problems experienced in the CJS and the challenges and inadequacies that need to be addressed, as these relate to the CPA. The workshops provided an important platform for conversation and debate among the Departments and institutions in the criminal justice value chain. The outcome of the workshops assisted the SALRC in developing a framework for the scope of the review of the CJS and conceptualising the issues to be addressed. The framework outlines several thematic areas related to the pre-trial, trial and post-trial phases. These thematic areas have been identified as they relate to areas of our criminal law, particularly the CPA, that need reform. This discussion paper stems from the thematic area trial anew (re-trial) under the trial phase.

B Structure of the Discussion Paper

1.5 Chapter 1 outlines information regarding the various programmes, policies, and initiatives aimed at reforming South Africa's Criminal Justice System since 1996. It explains where the SALRC's mandate originates from to conduct the investigation into the review of the Criminal Procedure Act (CPA) and the processes that have been followed, leading to the identification of the issue of trial anew as a thematic area to be addressed in the review of the CPA.

1.6 Chapter 2 outlines the main legal problems that arise when a judicial officer is unable to continue a partially heard criminal trial over which he or she presided. It explains the concept of a trial anew and analyses the legal and practical consequences of commencing a trial anew. The chapter provides a comprehensive analysis of the current South African legal framework, identifying a significant legislative gap related to the continuation of trials when a magistrate or judge becomes permanently unavailable prior to delivering a verdict on the guilt of the accused. Moreover, it contextualises this gap through a comparative examination of other jurisdictions, demonstrating that alternative legal approaches exist.

1.7 Chapter 3 evaluates the technological limitations of the current court system in capturing witness demeanour and outlines the ongoing shift towards audio-visual technology to ensure the integrity and continuity of court proceedings.

1.8 Chapter 4 examines the practical and systemic underpinnings of the crisis in court record-keeping. It begins by outlining the comprehensive statutory and regulatory framework governing court record management. It then contrasts this ideal with the practical realities, providing substantial evidence of systemic failures, including poor record-keeping practices and faulty recording equipment. Finally, this chapter analyses the severe legal and procedural consequences of these failures, such as the considerable difficulties associated with reconstructing lost records and the detrimental impact of case delays, which often lead to the ultimate systemic failure: a trial anew.

C Workshop on the Review of the Criminal Justice System

1.9 On 29 August 2025, the Commission hosted a workshop titled “Workshop on the Review of the Criminal Justice System: Review of the Criminal Procedure Act, 1977”. The event brought together Commissioners, Advisory Committee Members, and governmental stakeholders to provide input on six discussion papers related to the review of the Criminal Procedure Act. Serving as a vital platform for debate, the workshop allowed for in-depth discussion and feedback on the papers. A previous version of this discussion paper was among those reviewed. This revised version integrates valuable feedback obtained during the workshop.

D Issue not addressed in Discussion Paper

1.10 The discussion would not be complete without mentioning that unreasonable delays in criminal trials contribute to the necessity of trials commencing anew. Judicial officers presiding over criminal trials are not immune to the vicissitudes of life, whether favourable or unfavourable, that may occur during the course of a trial. Therefore, delays in trials are increasing the likelihood of these occurrences happening. To address the problem of unreasonable delays, the Legislature enacted section 342A of the CPA that aims to uphold the constitutional right to a fair trial, which inherently includes the right to have criminal proceedings begin and conclude without unreasonable delay.¹ It empowers courts to actively address and remedy such delays by outlining factors to consider when determining if a delay is unreasonable, such as the duration of the delay, the reasons for the delay, the prejudice

¹ Section 35(3)(d) of the Constitution of the Republic of South Africa, 1996.

caused to any party, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, and the loss of evidence.² Crucially, it provides a range of orders a court can make to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice.³

1.11 However, section 342A fails to address Stalingrad tactics (also known as the Stalingrad defence). This involves wearing down the plaintiff by tenaciously contesting anything the plaintiff presents by whatever means possible and appealing every ruling favourable to the plaintiff.⁴ Furthermore, delays are also caused by the bringing of interlocutory applications. These issues will not be addressed in this paper, as they will be covered in a different discussion paper under the thematic area “right to a fair trial”.

² Section 342A(2).

³ In terms of section 342A(3) the court may issue any order to, including an order –

- (a) refusing further postponement of the proceedings;
- (b) granting a postponement subject to any such conditions as the court may determine;
- (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
- (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
- (e) that-
 - (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
- (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

⁴ Bohler-Muller N “South Africa’s court system has been abused by powerful people: five ways to stop it” *Human Sciences Research Council* 18 September 2023 (Accessed at <https://hsrc.ac.za/news/latest-news/south-africas-court-system-has-been-abused-by-powerful-people-five-ways-to-stop-it/> on 28 May 2025). See also Judges Matter “Using Stalingrad tactics to delay justice” 19 June 2018 (Accessed at <https://www.judgesmatter.co.za/opinions/using-stalingrad-tactics-to-delay-justice/> on 28 May 2025).

CHAPTER 2: RESUMPTION OF CRIMINAL PROCEEDINGS BY NEW PRESIDING OFFICER

A Introduction

1 Meaning of Trial Anew

2.1 It is widely accepted that, whenever practically possible, the trial magistrate or judge should preside over the entire case and ultimately deliver judgment. This is important because the final decision-maker should be able to carefully consider the evidence in conjunction with his or her observations of the demeanour of witnesses.⁵ However, it is recognised that due to the vicissitudes of life, a trial magistrate or judge may face various circumstances that prevent him or her from continuing his or her duties. These circumstances include the magistrate or judge passing away, retiring, resigning from service, being transferred or becoming incapacitated.⁶ Hence, the default rule⁷ is for the trial to start afresh⁸ in these circumstances if the presiding officer becomes unavailable before the court could give a verdict. The essence of this is to allow the new judicial officer the opportunity to fulfil his or her primary role of receiving evidence presented by the parties and ascribing probative value⁹ to it. The new judicial officer is privileged to do this because he sees, hears, and observes the demeanour of the witnesses.¹⁰

⁵ *Abdi Adan Mohamed v. Republic* [2017] eKLR Criminal Appeal 1 of 2017.

⁶ *Director of Public Prosecution v Kipyegon Josphat and Others* [2019] eKLR [Criminal Revision No. 170 Of 2019] at par 14.

⁷ *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* (1419/2006) [2018] ZAKZDHC 24; 2018 (6) SA 230 (KZD) (4 June 2018) at paragraphs 4 and 7.

⁸ *De novo* is a Latin term that means "anew," "from the beginning," or "afresh.". See the *Wex* legal dictionary hosted by the Legal Information Institute at Cornell Law School. (Information accessed at <https://www.law.cornell.edu/wex> on 29 May 2025)

⁹ Whether the evidence is credible or not.

¹⁰ SPA Ajibade "Effects of an order of trial de novo on orders made at interlocutory stage by the previous trial judge" (Accessed at <https://spaaajibade.com/effects-of-an-order-of-trial-de-novo-on-orders-made-at-interlocutory-stage-by-the-previous-trial-judge/> on 4 June 2025)

2.2 A trial anew means that the entire proceedings, including the leading of evidence, must start afresh before a different judicial officer, as if there had been no trial in the first instance.¹¹ Thus, when a court hears a case afresh, it is deciding the issues without reference to any legal conclusion or assumption made by the previous court.¹² It is a new trial on the entirety of the case, both on facts and law.

2 When a Trial Anew may be ordered

2.3 A trial anew may be ordered under several circumstances, including—

- (a) when the presiding judicial officer is unavailable due to death, ill-health, resignation,¹³ retirement,¹⁴ recusal¹⁵ or suspension¹⁶ and will not be available in the future to finalise the trial;¹⁷
- (b) when it is not possible to reconstruct the record of proceedings of the trial court;¹⁸
- (c) when a decision is set aside because of a gross irregularity;¹⁹
- (d) when the court orders a separation of trials if a joint trial would prejudice one or more of the accused,²⁰ resulting in a new trial for the accused who have been separated from the original proceedings;

¹¹ Cornell Law School:Legal Information Institute “trial de novo” April 2025 (Accessed at https://www.law.cornell.edu/wex/trial_de_novo on 29 May 2025).

¹² Cornell Law School:Legal Information Institute “de novo” (Accessed at https://www.law.cornell.edu/wex/de_novo on 29 May 2025).

¹³ *S v Thobela* (258/07) [2007] ZAGPHC 204; 2008 (1) SACR 605 (W) (11 September 2007); *S v Polelo* 2000 (2) SACR 734 (NCD).

¹⁴ *S v Mmampa and Another* 2001 (2) SACR 242 (W).

¹⁵ *S v Tyumre* 1990 (2) SACR 528 (CK).

¹⁶ Nokuthula Ngcob “Senzo Meyiwa murder trial could start from scratch – here’s why” The South African 4 July 2023 (Accessed at <https://www.thesouthafrican.com/lifestyle/celeb-news/breaking-senzo-meyiwa-murder-trial-start-de-novo-scratch-why-judge-ratha-mokgoatlheng-tshafhiwa-maumela-4-july-2023/> on 23 May 2025); *S v Lapping* 1998 (1) SACR 409 (WLD).

¹⁷ This includes the unavailability of a presiding judicial officer for any other reason, provided that he or she will not be available in the future to finalise the trial.

¹⁸ See paragraphs 4.32 – 4.37 for a detailed discussion on the challenges in reconstructing incomplete and lost court records.

¹⁹ *Kgatuke and Another v Additional Magistrate C Van Niekerk (Langley) and Another* (REV120/23) [2024] ZALMPPHC 199 (4 December 2024). See also section 22 of the Superior Courts Act, 10 of 2013.

²⁰ Section 157 of the Criminal Procedure Act 51 of 1977 does not explicitly mention the term “trial *de novo*” in the context of a separation under this section. However, a trial *de novo* is a legal consequence that results from the court’s decision to separate trials to prevent prejudice. See also *Fanoë and Another v S* (CC 40/21) [2022] ZAECELLC 8; 2022 (2) SACR 166 (ECMk) (28 February 2022), where the court granted a separation of trials due to the potential prejudice faced by the applicants.

- (e) when a conviction and sentence are set aside on appeal in terms of section 324 of the CPA; or
- (f) when it is required in the interest of justice.²¹

2.4 The interests of justice might also require that a case not commence anew, as was the situation in *S v Thobela*,²² where the trial faced multiple postponements spanning more than five years. After the accused absconded, the original magistrate resigned²³ before pronouncing whether the accused was guilty or not.²⁴ The accused was re-arrested after some time had passed, but the trial magistrate was no longer available to conclude the trial. Significant delays also occurred in sending the review record to the High Court.²⁵ Both the referring magistrates and the Director of Public Prosecutions were of the view that the proceedings should be set aside and that the accused should be tried anew before another magistrate.²⁶ However, the High Court found that the accused suffered substantial prejudice due to the delays and that a retrial would cause further prejudice.²⁷ The court specifically refrained from declaring the proceedings a nullity, as this would have exposed the accused to a fresh trial.²⁸ The court concluded that the interests of justice would be better served by acquitting the accused rather than ordering a retrial.²⁹

2.5 However, this paper will primarily focus on the circumstances outlined in paragraph (a) and how the law should be reformed to allow a trial to continue before a new judicial officer from the point where the previous judicial officer left off.

²¹ *S v Bireke* 2003 (2) SACR 225 (TPD); *S v Mmampa and Other* 2001 (2) SACR 242.

²² 258/07) [2007] ZAGPHC 204; 2008 (1) SACR 605 (W) (11 September 2007).

²³ Paragraph 10.

²⁴ Paragraph 12.

²⁵ Paragraph 13.

²⁶ Paragraph 12.

²⁷ Paragraph 17.

²⁸ Paragraph 12.

²⁹ Paragraph 18.

B Legal and Practical Consequences of Commencing a Trial Anew

2.6 A significant consequence of commencing a trial anew is that the initial proceedings are effectively and completely nullified, requiring the parties to start proceedings anew and present their evidence afresh.³⁰ This means that all aspects of the first trial—including the plea, the evidence led, and any interim rulings made by the presiding judicial officer—are expunged from the court record.³¹

2.7 Beyond the stark legal implications, the practical consequences of a trial anew can be devastating for the parties. The most immediate and tangible impact is the significant delay in finalising the prosecution of the accused. As noted in *S v Rakimana*,³² the right to have a trial begin and conclude without unreasonable delay³³ is a key component of the right to a fair trial³⁴ under section 35(3) of the Constitution.³⁵ A trial anew inevitably resets the clock, often adding years to the prosecution process.³⁶ The tangible repercussions of these consequences were illustrated in *State v Muzikawukhulelwa Sibiyi and Four Others* (Gauteng Division, Pretoria)³⁷ (Senzo Meyiwa murder trial). The proceedings had to start afresh after the original presiding officer, Judge Tshifhiwa Maumela, was suspended following recommendations from the Judicial Service Commission (JSC) due to delays in delivering reserved judgments.³⁸ Furthermore, Maumela was reportedly experiencing health issues, which further hampered his ability to continue presiding over the trial.³⁹ Consequently, retired Judge Ratha

³⁰ Nkosi N “Meyiwa matter will start again with the appointment of a new judge” 25 March 2024 (Accessed at [Meyiwa matter will start again with the appointment of a new judge](#) on 29 May 2025).

³¹ Please refer to paragraphs 4.1 to 4.2 for a more detailed explanation of what constitutes the record of proceedings.

³² 2021 (2) SACR 531 (LP).

³³ Section 35(3)(d) of the Constitution of the Republic of South Africa, 1996.

³⁴ See paragraphs 4.30 – 4.31 for more information on the right to a fair trial.

³⁵ Constitution of the Republic of South Africa, 1996.

³⁶ See paragraphs 4.38 – 4.43 for more information on delays.

³⁷ The full formal citation for the Senzo Meyiwa murder trial, which is currently ongoing, will only be available once the judgment is delivered.

³⁸ Nokuthula Ngcob “Senzo Meyiwa murder trial could start from scratch – here’s why” *The South African* 4 July 2023 (Accessed at <https://www.thesouthafrican.com/lifestyle/celeb-news/breaking-senzo-meyiwa-murder-trial-start-de-novo-scratch-why-judge-ratha-mokgoatlheng-tshafhiwa-maumela-4-july-2023/> on 23 May 2025).

³⁹ Lerato Mutsila “Senzo Meyiwa Trial: Judge Tshifhiwa Maumela’s Health Crisis May Cause Trial to Start From Beginning” 13 June 2023 (Accessed at <https://briefly.co.za/south-africa/161613->

Mokgoatlheng was appointed to take over the case.⁴⁰ This resulted in significant further delays in a matter of considerable public interest, prolonged the agony for the victim's family, and necessitated witnesses to testify again, thereby exposing them once more to the trauma of recounting the same sensitive evidence.

2.8 The financial implications are equally grave, not only for the State but also for the accused who may have invested considerable amounts in legal representation and will need to bear these costs once more.⁴¹ This was acknowledged by Moshidi J, in *S v Thobela*,⁴² who stated as follows: “The only issue that concerns me immensely is whether the ends of justice would be promoted should the accused again be put through the agony, anxiety, expense and time of a retrial”.⁴³

2.9 Moreover, the decision to restart the trial process can have a profound impact on witnesses. During the time that has passed since the original trial, witnesses may struggle to accurately recall their testimony from the previous trial.⁴⁴

2.10 Given these severe consequences, courts do not order a trial anew lightly.⁴⁵ The fundamental principle remains that the new judicial officer cannot simply rely on the record of the previous proceedings. This is because the new judicial officer must personally observe and hear the evidence presented in order to evaluate the demeanour of the witnesses and assess their credibility.

[senzo-meyiwa-trial-judge-tshifhiwa-maumelas-health-crisis-trial-start-beginning/](#) on 23 May 2025).

⁴⁰ Nokuthula Ngcob “Senzo Meyiwa murder trial could start from scratch – here’s why” The South African 4 July 2023 (Accessed at <https://www.thesouthafrican.com/lifestyle/celeb-news/breaking-senzo-meyiwa-murder-trial-start-de-novo-scratch-why-judge-ratha-mokgoatlheng-tshafhiwa-maumela-4-july-2023/> on 23 May 2025).

⁴¹ See also paragraphs 4.43.

⁴² 2008 (1) SACR 605 (W) (11 September 2007).

⁴³ Paragraph 12.

⁴⁴ See also paragraph 4.35.

⁴⁵ In *S v Thobela* (2008 (1) SACR 605 (W)), the High Court, expressed concern over the inordinate delays and their impact on the accused’s right to a fair trial should the proceedings start afresh. The court noted that the accused had already endured significant prejudice due to the prolonged proceedings. Considering the circumstances, including difficulties in tracing witnesses and the lack of medical evidence to support the severity of the assault, the court concluded that the interests of justice would be best served by acquitting the accused. This effectively closed the door to commencing the trial afresh.

C The Current Legal Position

1 Constitution

2.11 Section 35(3)(d) of the Constitution⁴⁶ provides that every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.

2 Magistrates' Courts Act, 32 of 1944

2.12 The right to a fair trial is safeguarded by section 9(7)(a) of the Magistrates' Courts Act.⁴⁷ This provision provides that a magistrate who presided in criminal proceedings in which a plea was recorded and who has vacated his or her office is still responsible for disposing of those proceedings, including an application for leave to appeal in respect of such proceedings. For this purpose, the magistrate continues to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of the proceedings.

2.13 Section 9(7)(a) is a mechanism that may be invoked to ensure that magistrates who vacate their office dispose of proceedings over which they presided. The provision contributes to the smooth functioning of the court system. It further prevents delays, as cases where a magistrate vacated office after a plea was recorded won't be reassigned to a different magistrate.

2.14 In addition to the mechanism for continuity provided by section 9(7)(a), the issue of which judicial authority is empowered to order a trial anew was considered by the court in *Rakimana v S*.⁴⁸ The court dealt with the question of whether the High Court's guidance should be sought every time a magistrate is unable to proceed with a case due to reasons such as death, recusal, dismissal, discharge from employment, resignation, or mental derangement.⁴⁹ The court found that the High Court's intervention was not needed. The court was of the view that the head of the magistrate's court concerned is obliged to apply the "unavailability or non-availability" test to decide whether to declare the proceedings a nullity and have the trial start

⁴⁶ Constitution of the Republic of South Africa, 1996.

⁴⁷ 32 of 1944.

⁴⁸ (REV27/2021) [2021] ZALMPPHC 89 (28 April 2021).

⁴⁹ The High Court would review the case to decide whether the proceeding should be set aside as a nullity and if it must start afresh before another magistrate.

afresh. Furthermore, the court found that there is no justification for a High Court order to be sought in order to avoid unnecessary delay in the speedy finalisation of the trial.⁵⁰ The necessity of this formal declaration, however, has been the subject of differing judicial views. While the courts in *S v Polelo*⁵¹ and *S v Hanekom*⁵² held that a formal declaration of nullity was not a prerequisite for commencing a trial anew, the court in *S v Thobela*⁵³ took a different approach. It specifically refrained from declaring the proceedings a nullity precisely to shield the accused from the prejudice of a retrial. Ultimately, the court in *Rakimana* found that there is no justification for a High Court order to always be sought, as this would cause unnecessary delays in the speedy finalisation of trials.

3 Criminal Procedure Act, 51 of 1977

2.15 The right to a fair trial is further strengthened by the provisions of section 106(4) and section 118 of the CPA. Section 106(4) states that an accused who pleads to a charge or an accused on behalf of whom the court enters a plea of not guilty is entitled to demand that he or she be acquitted or convicted. This is in line with the common law principle that trial proceedings must be commenced promptly and brought to a close as expeditiously as possible.⁵⁴ Furthermore, section 118 provides that if the judge, regional magistrate, or magistrate presiding over a summary trial where the accused has pleaded not guilty is unavailable for any reason to continue with the trial and no evidence has been presented yet, the trial may be continued before another judge, regional magistrate, or magistrate from the same court.

2.16 Section 215 of the CPA, read with section 214 of the CPA, is an exception to the practice that the trial must start afresh. This section states as follows:

The evidence of a witness given at a former trial may, in the circumstances referred to in section 214, *mutatis mutandis* be admitted in evidence at any later trial of the same person upon the same charge.

2.17 Furthermore, section 214 states as follows:

The evidence of any witness recorded at a preparatory examination-

⁵⁰ Paragraph 29.

⁵¹ 2000 (2) SACR 734 (NCD).

⁵² 2004 (1) SACR 490 (CPD).

⁵³ 258/07) [2007] ZAGPHC 204; 2008 (1) SACR 605 (W) (11 September 2007).

⁵⁴ *Rakimana v S* (REV27/2021) [2021] ZALMPPHC 89 (28 April 2021) at par 13.

(a) shall be admissible in evidence on the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court-

- (i) that the witness is dead;
- (ii) that the witness is incapable of giving evidence;
- (iii) that the witness is too ill to attend the trial; or
- (iv) that the witness is being kept away from the trial by the means and contrivance of the accused; and

(v) that the evidence tendered is the evidence recorded before the magistrate or, as the case may be, the regional magistrate, and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness;

(b) may, if such witness cannot, after a diligent search, be found for purposes of the trial of the accused following upon such preparatory examination, or cannot be compelled to attend such trial, in the discretion of the court, but subject to the provisions of subparagraph (v) of paragraph (a), be read as evidence at such trial, if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness.

2.18 The Supreme Court of Appeal (SCA) in *S v Gumbi and Others*⁵⁵ set out the circumstances under which section 215, read with section 214, will find application. In this case, the appellants were indicted on a multiplicity of charges before Webster J in the High Court. Unfortunately, the judge became incapacitated due to illness before passing a verdict on any of the charges, thereby leaving his conclusions unpronounced.⁵⁶ The prosecutor then lodged an ‘application for special review’ with the High Court. The application sought permission for a special review of the matter by two judges in chambers to determine whether a judgment can be delivered in the absence of the presiding officer who heard the evidence during the trial and whether this can be done without the parties having to argue the matter again.⁵⁷

2.19 Jordaan and Potteril JJ, who considered the application, were of the view that the “State and all the accused, duly informed, consent that the trial start *de novo*. The *de novo* trial can then, with the consent of all the parties in terms of s 215 of the Act, proceed on the evidence as recorded at the former trial. The arguments of the parties of the formal trial can

⁵⁵ 2018 (2) SACR 676 (SCA).

⁵⁶ Paragraph 1.

⁵⁷ Paragraph 2.

stand or can be supplemented at the parties' request".⁵⁸ Consequently, the case was started afresh before Potteril J, who received into evidence the record of the proceedings before Webster J. Potteril J commenced with the trial where Webster J had left off. Thus, no new evidence was led before Potteril J. The appellants were convicted on three counts of murder, two of robbery with aggravating circumstances, two of attempted murder and one of malicious injury to property.⁵⁹

2.20 On appeal, the issue was whether section 215, read with section 214, could be invoked to address the prosecution's challenge in concluding this matter. The SCA found that Potteril J had misconceived the position. Additionally, section 215 is only applicable once the conditions of section 214 have been met.⁶⁰ The court stated the following in this regard:

When the requirements of s 214 are satisfied and it is established that the witness is dead, incapable of testifying, too ill to attend the trial or being kept away from the trial by the accused, under subsection (a) the court has no discretion in regard to the admissibility of the evidence, which it must receive. If the witness cannot be found after diligent search or cannot be compelled to attend the trial, subsection (b) gives the court a discretion. In this regard it is important to note that our courts have long recognised that the discretion must be exercised guardedly and in a way that will not be prejudicial to the accused. The factors which should influence the judicial exercise of the discretion were summarised in *R v Stoltz* as follows:

'The court should look at the nature of the evidence sought to be put in. If, for instance, it conflicts with other evidence in the case, if from cross-examination the evidence as recorded would seem to leave a doubt, and generally where from the nature of the evidence much would depend on the credibility of the witness, so that a jury should have an opportunity of judging for themselves thereon from the appearance and demeanour of a witness, the court should be very slow in admitting the evidence under this section.'⁶¹

2.21 The SCA further held that section 215 requires that the trial be of the same person upon the same charge. Therefore, the section can only find application to a situation where the original or prior proceedings were declared a nullity and, in consequence, the trial starts afresh. It was thus for the prosecution to decide whether proceedings should be instituted with respect to the same offences on the original indictment, amended if necessary, or upon

⁵⁸ Paragraph 3.

⁵⁹ Paragraph 6.

⁶⁰ Paragraph 6.

⁶¹ Paragraph 11.

any other charge.⁶² Hence, it is the function of the prosecuting authority, not the court, to remit the matter for trial *de novo* and decide the charges on which an accused should be tried.⁶³

2.22 Section 215, read with section 214, also applies in circumstances outlined in section 324 of the CPA, which deals with the institution of proceedings anew when a conviction is set aside on appeal.⁶⁴ This section states as follows:

Whenever a conviction and sentence are set aside by the court of appeal on the ground-

- (a) that the court which convicted the accused was not competent to do so; or
- (b) that the indictment on which the accused was convicted was invalid or defective in any respect; or
- (c) that there has been any other technical irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.

2.23 Section 275 of the CPA outlines the procedure to be followed when a judicial officer who initially presided over criminal proceedings becomes unavailable after conviction but before sentence is passed. This section states as follows:

(1) If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he or she had not been absent.

(2) Whenever-

- (a) a judge is required to sentence an accused convicted by him or her of any offence; or
 - (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of an accused,
- and that judge is for any reason not available, any other judge of the provincial or local division concerned may, after consideration of the evidence recorded and in the

⁶² Paragraph 9. See also Hiemstra *Hiemstra's Criminal Procedure* (Lexis Nexis loose-leaf February 2023) 15:24-39, and Du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 69, 2022) ch24-p42.

⁶³ Paragraph 14.

⁶⁴ Hiemstra *Hiemstra's Criminal Procedure* (Lexis Nexis loose-leaf February 2023) 15:24-39.

presence of the accused, sentence the accused or, as the case may be, take such other steps as the former judge could lawfully have taken in the proceedings in question if he or she had been available.

2.24 Section 275 aims to ensure that the trial proceeds to completion following a conviction, thereby avoiding the need for a new trial. The High Court in *S v Thobela*⁶⁵ remarked about section 275 as follows:

It is evident that, although section 275 of the Act makes provision for an accused person to be sentenced by a judicial officer other than the one who convicted the accused and who has since become unavailable in certain circumstances, the Act does not contain any express provision covering the situation that has arisen in the instant matter. In other words, it does not make provision for the further conduct of a part-heard matter before conviction if the trial court becomes unavailable for whatever reason.⁶⁶

2.25 The court further stated that section 275 should be amended to deal with part-heard matters before conviction in the absence of the trial magistrate, as well as to clarify when new proceedings may be instituted in part-heard matters prior to conviction.

2.26 A possible reason why the Legislature has not enacted a similar provision to deal with part-heard matters prior to delivering a verdict is that judicial officers do not always have the opportunity to record in writing their observations about the demeanour and credibility of witnesses, before the event that renders them unavailable occurs. On the other hand, in the case of sentencing, credibility and factual findings have already been made.

4 Superior Courts Act, 10 of 2013

2.27 Although the specific rules for multi-judge benches in the Superior Courts differ from those for single-judge trials, the principles governing the adjournment or commencement of proceedings are outlined below to provide context. The information below demonstrates that commencing proceedings afresh due to the unavailability of a judicial officer is a fundamental procedural rule applied uniformly throughout the judicial system. This systemic perspective highlights the significance of the legislative gaps previously identified⁶⁷ and underscores the necessity for a coherent solution.

⁶⁵ (258/07) [2007] ZAGPHC 204; 2008 (1) SACR 605 (W) (11 September 2007).

⁶⁶ Paragraph 9.

⁶⁷ See the discussion under paragraphs 2.24 – 2.26.

2.28 Any matter before the Constitutional Court must be heard by at least eight judges.⁶⁸ However, if a judge is absent or unable to perform his or her functions at any stage after a hearing has commenced, or if a vacancy arises and the remaining number of judges is fewer than eight, the proceedings must be stopped and commenced anew.⁶⁹

2.29 Proceedings of the Supreme Court of Appeal must be presided over by five judges.⁷⁰ However, the President of the Supreme Court of Appeal has the authority to direct that an appeal in a criminal or civil matter be heard before a court consisting of three judges.⁷¹ Furthermore, if the President deems a matter to be of significant importance, he or she may direct that it be heard before a court consisting of so many judges as he or she may determine.⁷²

2.30 The decision of the majority of the judges presiding at proceedings before the Supreme Court of Appeal is the judgment of the court.⁷³ Where there is no judgment to which a majority of the judges agree, the hearing must be adjourned and commenced anew before a new court constituted in such manner as the President of the Supreme Court of Appeal may determine.⁷⁴

2.31 If, at any stage after the hearing of an appeal has commenced, a judge of the Supreme Court of Appeal is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises in any other case, the appeal must be heard anew. However, the appeal does not need to start afresh if all parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges, or if only one judge remains, the decision of that judge as the decision of the court.⁷⁵

⁶⁸ Section 12(1).

⁶⁹ Section 12(2)(b). In cases before the Supreme Court of Appeal or a Division of the High Court, if all parties involved agree in writing to accept the decision of the majority of the remaining judges, or if only one judge remains, the decision of that judge stands as the decision of the court. However, this is not the case with the Constitutional Court. This is because the Constitutional Court is the last court of appeal.

⁷⁰ Section 13(1).

⁷¹ Section 13(1)(a).

⁷² Section 13(1)(b).

⁷³ Section 13(2)(a).

⁷⁴ Section 13(2)(b).

⁷⁵ Section 13(3)(b).

2.32 As regards the High Court, the decision of the majority of the judges of a full court⁷⁶ of a Division is the decision of the court.⁷⁷ If the majority of the judges are not in agreement, the hearing must be adjourned and commenced anew before a court consisting of three different judges.⁷⁸ If, at any stage during the hearing of a matter by a full court, if a judge of such court is absent or unable to perform his or her functions, or if a vacancy arises among the members of the court, the hearing must commence anew if the remaining judges do not constitute a majority of the judges, or if only one judge remains. However, all the parties to the proceedings can agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.⁷⁹

D Comparative analysis

1 Introduction

2.33 Some jurisdictions have adopted legislative measures to ensure that if a judicial officer becomes unavailable after starting with a criminal trial and a new judicial officer is assigned to the partly heard case, the trial does not start afresh. Instead, it continues from the point at which the previous presiding officer's involvement ended.

2 India

2.34 In India, section 326 of the Code of Criminal Procedure, 1973 states as follows:

(1) Whenever any [Judge or Magistrate], after having heard and recorded the whole or any part of the evidence in any enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another [Judge or Magistrate] who has and who exercises such jurisdiction, the [Judge or Magistrate] so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself: Provided that if the succeeding [Judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of Justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

⁷⁶ 'full court', in relation to any Division, means a Court consisting of three judges.

⁷⁷ Section 14(4)(a).

⁷⁸ Section 14(4)(b).

⁷⁹ Section 14(5)(b).

2.35 One noteworthy aspect of the Indian legal system is that the new presiding officer has the discretion to recall witnesses and obtain additional evidence. This offers a solution to the challenge of observing the demeanour of witnesses.⁸⁰

3 Kenya

2.36 In Kenya, the presiding officer assigned to a partly heard case has the discretion to decide whether to recall witnesses, as in the case of India. Section 200 of the Criminal Procedure Code of Kenya provides as follows:

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may— (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.⁸¹

2.37 Furthermore, section 34 of the Evidence Act of Kenya provides clarity on the admissibility of evidence given in previous proceedings. The section states as follows:

⁸⁰ Kuwornu, S. "Trying criminal cases de novo: The Ghana situation" 31 March 2021. Available at <https://www.ghanalawhub.com>

⁸¹ <https://kenyalaw.org>

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

- (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable; and where, in the case of a subsequent proceeding—
 - (b) the proceeding is between the same parties or their representatives in interest; and
 - (c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and
 - (d) the questions in issue were substantially the same in the first as in the second proceeding.
- (2) For the purposes of this section—
- (a) the expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and
 - (b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.⁸²

2.38 Section 200 of *the Criminal Procedure Code* has been the subject of numerous court judgments. In *Joseph Kamau Gichuki v Republic*,⁸³ it was held: -

This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor.⁸⁴

2.39 In *Abdi Adan Mohamed v. Republic*⁸⁵ the court held that -

... some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial *de novo*, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

2.40 The court in *Director of Public Prosecution v Kipyegon Josphat and Others*⁸⁶ expressed the view that –

... section 200 of the CPC is not a *carte blanche* license for criminal cases to always start *de novo* every time a trial court changes. It is a desirable idealistic aspiration.

⁸² <https://kenyalaw.org>

⁸³ [2013] eKLR Criminal Appeal 523 of 2010.

⁸⁴ This was echoed in *Abdi Adan Mohamed v. Republic* [2017] eKLR Criminal Appeal 1 of 2017.

⁸⁵ [2017] eKLR Criminal Appeal 1 of 2017.

⁸⁶ [2019] eKLR [Criminal Revision No. 170 of 2019].

However, like all aspirations, it has limitations. The limitation is what the Court of Appeal set out in the case of *Abdi Adan Mohamed v. Republic*⁸⁷

4 Tanzania

2.41 Section 214 of the Criminal Procedure Act, CAP. 20 R.E. 2022, of Tanzania addresses situations where, for some reason, a magistrate is unable to complete a matter he or she has already begun to hear. This section states as follows:

(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings.

(2) Whenever the provisions of subsection (1) apply, the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.

(3) Nothing in subsection (1) shall be construed as preventing a magistrate who has recorded the whole of the evidence in any trial and who, before passing the judgment is unable to complete the trial, from writing the judgment and forwarding the record of the proceedings together with the judgment to the magistrate who has succeeded him for the judgment to be read over and, in the case of conviction, for the sentence to be passed by that other magistrate.

2.42 The Court of Appeal of Tanzania in 2013, in *Priscus Kimario v. Republic*, Criminal Appeal No. 301 of 2013, dealt with how section 214 should be interpreted. The first magistrate in the case heard the evidence of two witnesses before it was taken over by the second magistrate, who brought it to completion. The court of appeal remarked that there was nothing on record to show why the partly heard matter had to be re-assigned to another magistrate. The court, therefore, found that, where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded.

2.43 This ruling was followed by the High Court case in *Ibrahim Zakaria @ Gebwana & Two Others v. Republic*, Criminal Appeal No. 21 of 2022, where the court affirmed that “the change

⁸⁷ Paragraph 16.

of one judicial officer to another during the proceedings in criminal trials must be accompanied with reasons". The High Court also referred to *Abdi Masoud @ Iboma and Three others vs Republic*, Criminal Appeal No. 116 of 2015, where it was stated as follows:

In our view under s. 214 (1) of the CPA it is necessary to record the reasons for re-assignment or change of trial magistrate. It is a requirement of the law and has to be complied with. It is a pre-requisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try case.

2.44 The High Court further stated that if a successor magistrate fails to give reasons for taking over proceedings started by another magistrate, all proceedings of the successor magistrate must be nullified, the conviction set aside, and the judgment quashed, as the proceedings that produced the judgment have no basis. Therefore, the case should be remitted to the district court to continue from the point at which the first magistrate left off prior to the second magistrate taking over the proceedings.

5 United States of America

2.45 Rule 25 of the Federal Rules of Criminal Procedure addresses instances where a judge who has begun a trial is unable to continue presiding over that trial. Rule 25 stipulates as follows:

Rule 25. Judge's Disability

(a) During Trial. Any judge regularly sitting in or assigned to the court may complete a jury trial if:

- (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and
- (2) the judge completing the trial certifies familiarity with the trial record.

(b) After a Verdict or Finding of Guilty.

- (1) In General. After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.
- (2) Granting a New Trial. The successor judge may grant a new trial if satisfied that:
 - (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or
 - (B) a new trial is necessary for some other reason.⁸⁸

⁸⁸ Cornell Law School: Legal Information Institute "Federal Rules of Criminal Procedure" (Accessed at https://www.law.cornell.edu/rules/frcrmp/rule_25#:~:text=After%20a%20verdict%20or%20findi)

E Recommendations

1 Continuation of Criminal Trials upon Unavailability of Presiding Officer

2.46 Having considered the information outlined in this chapter, the Commission recommends that the following provision be included in the CPA under Chapter 25:

(1) Where a magistrate or judge becomes unavailable after hearing all or any part of the evidence in a trial before a verdict is reached, the head of that court may, if it is in the interest of justice, —⁸⁹

- (a) direct that the trial proceed before a different (succeeding) magistrate or judge, provided the original magistrate or judge is unable to resume the trial within a reasonable time and that—
 - (i) the succeeding magistrate or judge is satisfied that the demeanour of the witnesses, with respect to material aspects of their evidence, can be determined from the record of the proceedings;⁹⁰
 - (ii) the witnesses who have already testified and whose testimony is crucial to prove or disprove the guilt or innocence of the accused are available to be resummoned for further examination, cross-examination or re-examination;⁹¹ or
 - (iii) the record of the proceedings of the previous trial is complete and legible.
- (b) refer the matter to the National Director of Public Prosecutions to commence the trial anew.

(2) In making a decision under subsection (1), the head of that court must consider all relevant circumstances, amongst others—

- (a) the potential for memory loss among witnesses who have already testified;
- (b) the time that has passed since the commencement of the trial;
- (c) the potential prejudice to either the prosecution or the accused if the trial commences anew; and
- (d) the impact of a trial anew on the accused's right to have his or her trial begin and conclude without unreasonable delay.

[ng%20of%20guilty%2C%20any%20judge%20regularly,%2C%20sickness%2C%20or%20othe r%20disability](#). on 30 May 2025).

⁸⁹ The discretion given to the head of the court permits an individual evaluation of the circumstances to ascertain what is in the best interest of justice.

⁹⁰ This provision implies that the succeeding magistrate or judge must study the record of proceedings to ascertain that the demeanour of the witnesses can be determined from the record. Furthermore, refer to paragraphs 4.1 to 4.2 for a more detailed explanation of what constitutes the record of proceedings.

⁹¹ This would enable the new presiding officer to observe the demeanour of the witnesses. It mitigates, to some extent, the shortcomings of a purely record-based assessment.

(3) The head of the court must give written reasons for any direction made under subsection (1)(a) that the trial proceed before a succeeding magistrate or judge, which reasons must be made available to the parties upon their request.⁹²

(4) The record of proceedings of the trial referred to in subsection (1) forms part of the record of proceedings before the succeeding magistrate or judge.

(5) Any witness who has already testified may be resummoned for further examination, cross-examination, or re-examination by—

(a) the court, if deemed necessary in the interests of justice;

(b) the prosecutor or the accused, with leave of the court.

(6) For purposes of this section, “head of that court” includes:

(a) the most senior judge of that court; or

(b) a magistrate who has been designated as the head of that court.

(7) Where a witness is resummoned under subsection (5), the examination, cross-examination, or re-examination of that witness shall be confined to—

(a) issues requiring clarification; and

(b) issues pertaining to the witness’s demeanour and credibility,

and shall not amount to a repetition of their previous testimony unless the court deems it in the interest of justice.

(8) A party may only appeal the decision of the head of court made under subsection (1) after the sentencing of the accused.

2.47 It is important to note that the absence of recorded observations regarding witness demeanour in the initial trial record should not automatically be construed as a judicial oversight. The omission may indicate that the witnesses’ demeanour was not considered material to the assessment of credibility. Consequently, a succeeding judicial officer is not constrained by a record that is silent on witness demeanour and may independently make a credibility finding based on a holistic assessment of all the evidence.

2.48 During the Commission’s workshop on the review of the criminal justice system,⁹³ a question was raised regarding whether the record of proceedings of the initial trial constitutes a continuous record when submitted as evidence in proceedings before a succeeding magistrate or judge. This question arose because the succeeding magistrate or judge might disagree with the court’s decisions in the initial trial, such as whether specific evidence is admissible or the orders related to interlocutory applications. The response to this question was that decisions made during the initial proceedings should not be binding, and the succeeding judicial officer must ensure a fair trial based on his or her own assessment of the evidence.

⁹² This transparency is crucial for appellate review and for ensuring that the decision was not taken lightly.

⁹³ See paragraph 1.9.

2.49 Section 9(7) of the Magistrates' Courts Act provides a mechanism to ensure that magistrates who vacate their office dispose of proceedings over which they presided.⁹⁴ However, it fails to address instances of permanent unavailability such as death, incapacitation, or dismissal of the presiding judicial officer. In such instances, the law reaches a "dead end," necessitating a new trial regardless of the evidence already presented. This contrasts with the proposed provision in paragraph 2.46, which allows a different magistrate to continue the trial in the absence of the original magistrate. For legislative consistency, section 9(7) should be amended to harmonise the general rule regarding the vacating of office by a magistrate with the proposed authority conferred upon the head of court to direct that a trial proceed. Accordingly, the Commission recommends the amendment of section 9(7) by the insertion of the following provisions after paragraph (b) of that section:

(bA) Where a magistrate becomes unavailable to continue presiding over a trial after the accused has pleaded but before a verdict on the guilt of the accused is delivered, the provisions of section [X] of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) shall apply regarding the continuation of such trial or its commencement anew.⁹⁵

2 Finalisation of Cases by Magistrates Prior to Retirement

2.50 Judges are expected to finalise all the cases assigned to them, even after retirement.⁹⁶ Likewise, magistrates who presided over criminal proceedings in which a plea was recorded are required, despite their subsequent vacation of office, to conclude those proceedings. For this purpose, they continue to hold their office during any period when they are engaged in the

⁹⁴ The primary goal of the current section 9(7) is the completion of the case by the original magistrate.

⁹⁵ This removes the common law requirement that the judicial officer who hears the plea *must* be the one who delivers the verdict.

⁹⁶ Article 10(1)(j) of the Code of Judicial Conduct for Judges states that a judge must "upon resignation, discharge from active service, or the expiry of an acting appointment, complete all part-heard cases and deliver all reserved judgments as soon as possible." Furthermore, Article 10(2) of the code states that a judge must deliver all reserved judgments before the end of the term in which the hearing of a matter was completed. However, a reserved judgment may be delivered during the subsequent term if the matter was heard within two weeks of the end of a term, or where a reserved judgment is of a complex nature, subject to the approval of the head of the court. These provisions leave no ambiguity regarding the continuing professional responsibility of judges beyond their formal retirement date. See in this regard *Government Gazette* No.35802 of 18 October 2012. Furthermore, judges receive a salary for life, so it makes sense that they are expected to finalise all cases assigned to them even after retirement. See in this regard Skiti S and Bornman J "How judges' pay keeps rolling in" *Sunday Times* 2 June 2013; Judges' Remuneration and Conditions of Employment Act 47 of 2001.

disposal of such proceedings.⁹⁷ In addition, the Commission recommends that, at a specified period prior to the retirement date of judicial officers, the cases assigned to them be expedited to ensure their completion before their retirement.⁹⁸ One way to achieve this is to refrain from assigning additional cases to them during this specified period.

2.51 The Commission recommends that the Chief Justice, in terms of section 8 of the Superior Courts Act,⁹⁹ issue a directive requiring Judge Presidents to issue specific Practice Directives for their respective Divisions.¹⁰⁰ These directives should clearly delineate the measures necessary to ensure that all cases assigned to judicial officers are finalised prior to their retirement. As coordinating authorities for the lower courts within the jurisdiction of their divisions, Judge Presidents must ensure that these directives are mirrored and enforced by Regional Court Presidents and Chief Magistrates.

⁹⁷ Section 9(7)(a) of the Magistrates' Courts Act, 32 of 1944. The Norms and Standards for the Performance of Judicial Functions issued by the Chief Justice in 2014 stipulate that judgments should ideally be delivered no later than three months after the last hearing. This standard applies to all judicial officers. See in this regard Notice No.147 in Government Gazette No. 37390 of 28 February 2014.

⁹⁸ The Commission is of the view that, apart from situations like death or incapacitation, a judicial officer's retirement is foreseeable.

⁹⁹ 10 of 2013.

¹⁰⁰ Section 8(4)(c) of the Superior Courts Act, 10 of 2013.

CHAPTER 3: AUDIO-VISUAL TECHNOLOGY AND RECORDING OF COURT PROCEEDINGS

A Introduction

3.1 Technological progress has significantly enhanced the quality and accessibility of audio and video recordings in court proceedings. Modern recording equipment provides high-definition video and exceptional audio clarity, ensuring that every detail is captured precisely.¹⁰¹ Video recording, in particular, has become more accessible and prevalent in contemporary society. From surveillance cameras and dashcams to smartphones, the ability to capture video is now within reach of nearly every individual.¹⁰² These advancements have increased the reliability and usefulness of recordings as legal tools.¹⁰³

B The Significance of Video Recording in Capturing Witness Demeanour

3.2 Video recordings provide a visual representation of witnesses, ensuring that their demeanour is accurately captured. Unlike audio recordings, which may miss crucial nuances of nonverbal expressions and emotions, video recordings provide a complete and reliable account of courtroom interactions.¹⁰⁴ This is vital for understanding the context and intent behind the spoken words.¹⁰⁵

¹⁰¹ Renzi Legal Resources “Beyond the Transcript: The Role of Audio and Video Recordings in Court Proceedings” 14 August 2024 (Accessed at <https://rlresources.com/2024/08/14/beyond-the-transcript-the-role-of-audio-and-video-recordings-in-court-proceedings/> on 21 May 2025).

¹⁰² Marko Law “The Role of Video Evidence in Modern Legal Practices” 30 September 2024 (Accessed at <https://www.markolaw.com/post/the-role-of-video-evidence-in-modern-legal-practices> on 21 May 2025).

¹⁰³ Renzi Legal Resources “Beyond the Transcript: The Role of Audio and Video Recordings in Court Proceedings” 14 August 2024.

¹⁰⁴ VCE Legal Tech “Benefits of Videographer for Court Reporting” (Accessed at <https://www.vcelegaltech.com/insights/pros-and-cons-of-legal-videography-parr4-m2n4h> on 21 May 2025).

¹⁰⁵ Renzi Legal Resources “Beyond the Transcript: The Role of Audio and Video Recordings in Court Proceedings” 14 August 2024.

3.3 Video recordings are invaluable during appeals and reviews as they provide appellate courts with a first hand account of the trial proceedings. This enables appellate courts to understand the nuances of the original proceedings fully.¹⁰⁶

3.4 By adding visual context to the spoken words, video recordings offer a layer of accuracy, clarity, and depth that enhances the overall understanding of witnesses' testimonies.¹⁰⁷

C Audio-Visual Recording of Court Proceedings in South African Courts: Current Practices and Evolving Developments

3.5 Advancements in technology are overtaking the outdated court systems in South Africa.¹⁰⁸ Despite our courts' significant reliance on accurate documentation of court proceedings, they continue to depend on traditional methods such as written notes and audio recordings.¹⁰⁹ However, audio-visual recording has emerged as a superior tool for capturing the full context of testimonies, ensuring accuracy, fairness, and transparency.

3.6 Over the years, the justice system has made great strides in embracing technology and modern systems to maximise efficacy in its mandate to deliver justice services to all. Officially unveiled in 2011, the DOJ&CD implemented the Audio-Visual Remand (AVR) system, a cutting-edge software platform optimised for courtroom recording that includes intelligent audio and video processing that allows detainees to connect virtually while at correctional centres through a video link to the corresponding courts handling their cases.¹¹⁰ The AVR system is utilised to postpone criminal cases against accused persons in custody awaiting trial via a high-quality audio-visual link between the Correctional Centre and the court.¹¹¹ The main objective is to minimise the transportation of inmates from correctional

¹⁰⁶ Renzi Legal Resources "Beyond the Transcript: The Role of Audio and Video Recordings in Court Proceedings" 14 August 2024.

¹⁰⁷ VCE Legal Tech "Benefits of Videographer for Court Reporting".

¹⁰⁸ Rashri Baboolal-Frank "The Use Of Information Technology In South African Courts" University of Pretoria 2015.

¹⁰⁹ Ntengenyane K & Khayundi F "Harnessing a records management programme for justice delivery at the Alice magistrate court in the Eastern Cape Province, South Africa" (2021) 54 *Journal of the South African Society of Archivists* at 16.

¹¹⁰ Justice@Work "Audio Visual Remand" Vol 1: September 2020 (Accessed at <https://www.justice.gov.za/newsletter/jaw/2020-2021-jaw-vol01-Sep.pdf> on 24 May 2025).

¹¹¹ "Minister Simelane to assess implementation of the Virtual Remand Detainee Project" 6 November 2024 (Accessed on the official website of the DOJ&CD on 24 May 2025).

facilities to courts for the remand (postponement) of cases, thereby eliminating their flight risk and transportation costs.¹¹²

3.7 The DOJ&CD will commence in the 2025/26 financial year with the implementation of the Court Recording Audio-Visual Solution (4.1) to replace the outdated Court Recording Technology (CRT). This new technology will allow parties in a case to appear via video link, facilitating virtual legal processes such as appearances, remands, testimony, and trials. It will enable real-time automated transcriptions of court proceedings and support AI-driven language interpretation. Virtual courts will also protect vulnerable victims, such as women and children, by allowing them to attend court remotely and reducing the risk of detainee escapes and transportation costs by enabling detainees to appear via video link for case remands. The CRAVS solution will be rolled out to ensure that 50% of courthouses will be able to provide court proceedings virtually by the 2025/26 financial year.¹¹³ The full rollout of the CRAVS system across the country is anticipated to be completed within the next five years.¹¹⁴

3.8 South African courts have, in recent years, become more accommodating in terms of televised and radio broadcasting of trials.¹¹⁵ The media's state-of-the-art audio-visual equipment used for recording trials for broadcasting surpasses the technology currently available in our courts for recording criminal trials.

3.9 Courts typically imposed strict limitations on how the media may record the proceedings, as well as what and who can be included in their recordings.¹¹⁶ However, in the case of *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & Others*,¹¹⁷ the Supreme Court of Appeal adopted a more lenient stance on the media's rights during the recording of trial proceedings. The court remarked as follows:

¹¹² Justice@Work "Audio Visual Remand" Vol 1: September.

¹¹³ DOJ&CD "Annual Performance Plan 2025/2026" at 95.

¹¹⁴ DOJ&CD "Annual Performance Plan 2025/2026" at 95. See also Izette Knoetze "Courtroom of the future – virtual courts, e-courtrooms, videoconferencing and online dispute resolution" *De Rebus* 1 October 2014.

¹¹⁵ Lucien Pierce (PPM Attorneys) "The oscar broadcast judgment: why the court got it just right" 25 February 2014.

¹¹⁶ Lucien Pierce (PPM Attorneys) "The oscar broadcast judgment: why the court got it just right" 25 February 2014. See also Cambridge University Press "The courtroom as TV studio: the case of the Oscar Pistorius trial" 23 November 2018 (Accessed at <https://www.cambridge.org/core/journals/international-journal-of-law-in-context/article/courtroom-as-tv-studio-the-case-of-the-oscar-pistorius-trial/A6ECD69CF9CE467E59FB0DE3AAD70477>).

¹¹⁷ (425/2017) [2017] ZASCA 97 (21 June 2017).

[72] The default position has to be that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. This approach entails a witness-by-witness determination and recognises as well that a distinction may have to be drawn between expert, professional (such as police officers) and lay witnesses. Such an individualised enquiry is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. Under this approach cameras are permitted to film or televise all non-objecting witnesses. . . .

[73] If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness' fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over. . . .

[75] A decision on whether to restrict the broadcast of court proceedings raises the same set of rights as occupied the attention of this Court in *Midi Television*. It follows that the same approach should apply; namely that courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur ought not to be enough.

3.10 Although the media's coverage of criminal trials is limited, typically focusing on high-profile cases or those that are unusual or gruesome, it is worth considering, whilst awaiting the full implementation of the CRAVS system, whether the audio-visual recordings of those cases that do receive media attention should be obtained from the media organisations that reported on them for future purposes such as use in appeal cases. The recordings will also assist with the reconstruction of the court record and aid a presiding judicial officer assigned to a partly heard case in better understanding the demeanour of the accused and witnesses.

Should media organisations that have been granted permission by the court to cover criminal trial proceedings be obliged to provide the court with the full audio-visual recording of those proceedings? If so, how can it be ensured that the integrity of the recordings is preserved and that they are not tampered with before providing the court with a copy?

D Recommendations

1 Audio-Visual Recording of Witness Demeanour

3.11 The Commission welcomes the implementation of the CRAVS system,¹¹⁸ as it will greatly contribute to ensuring that the demeanour of witnesses during their testimonies in court is captured for future reference. The Commission urges the DOJ&CD to expedite the implementation process in light of the current challenges that hinder trials from proceeding from where a previous presiding officer left off, resulting in trials having to start afresh. Moreover, given the significance of capturing a witness's demeanour in the trial court, the Commission suggests that the introduction of video recording equipment in courts should commence in the magistrates' courts.

3.12 The Commission recommends that the Digital Court Recording System (DCRS) clerks undergo comprehensive training on how to operate the CRAVS system correctly.

¹¹⁸ Audio-visual recording technology equipment must be of the highest quality to reduce the risk of technical difficulties. This is because substandard equipment is prone to malfunctions and technical issues, which can compromise the usefulness of the recordings. Using audio-visual equipment to record court proceedings offers an extra safeguard, ensuring that the demeanour of witnesses is captured. This is especially valuable when presiding officers fail to take adequate notes on witness demeanour.

CHAPTER 4: COURT RECORD MANAGEMENT

A Introduction

4.1 A court hearing criminal proceedings, whether in a lower court or a superior court, must keep a record of the proceedings or cause such record to be kept, either in writing or mechanically (electronically).¹¹⁹ In the lower courts, the plea and explanation or statement of the accused, the evidence orally given, any exceptions or objections raised during the proceedings, the rulings and judgment of the court and any other part of the criminal proceedings form part of the record of the proceedings.¹²⁰ In the superior courts, the record includes any judgment or ruling given by the court, any evidence given in court, any objections made to evidence received or tendered, the proceedings of the court generally (including any inspection in loco and any matter demonstrated by any witness in court), and any other part of the proceedings that the court may specifically order to be recorded.¹²¹ Furthermore, the charge-sheet, summons or indictment also form part of the record.¹²²

4.2 The court record is the official, and often the only, verbatim account of proceedings, capturing not just the final order but the entire journey of a case: the evidence led (both orally and in documentary form), the arguments advanced, the objections raised and the observations made. Without a complete and accurate record, the very essence of a fair and open administration of justice is compromised.¹²³

4.3 Recording court proceedings plays a vital role in the review and appeals process. Utilising video or audio recordings proves to be extremely helpful, enabling the presiding

¹¹⁹ Section 5(1) of the Magistrates' Courts Act, 32 of 1944, states that "...the proceedings ... shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings". Furthermore, section 31(1) of the Superior Courts Act, 10 of 2013, states that "[e]very Superior Court is a court of record." See also section 76(3)(a) of the Criminal Procedure Act, 51 of 1977.

¹²⁰ Rule 66(1) of the Magistrates' Courts Rules.

¹²¹ Rule 39(16) of the Uniform Rules of Court in Erasmus *Superior Court Practice* 2 ed (Juta loose-leaf Service 20, 2022) D1-521.

¹²² Section 76(3)(a) of the Criminal Procedure Act, 51 of 1977.

¹²³ *S v Chabedi* 2005 (1) SACR 415 (SCA) confirmed that the record of the proceedings in the trial court is of cardinal importance and forms the whole basis of the rehearing by the court of appeal (see paragraph 5). Furthermore, *Phakane v S* (CCT61/16) [2017] ZACC 44; 2018 (1) SACR 300 (CC) revolves around the premise that without an adequate record of the trial proceedings, an appellate court cannot perform its function, thereby compromising the administration of justice (see paragraphs 35, 37 and 38).

judicial officer to revisit and analyse the original proceedings, grasp the complete context of the case, and assess any mistakes made during the initial trial process. This is also true in the case of a presiding judicial officer assigned to a case where the magistrate or judge has died, retired, resigned from service, or become incapacitated after evidence has been led but before a verdict is made.

B Statutory and Regulatory Framework for Court Record Management

4.4 Section 4(1) of the Magistrates' Courts Act¹²⁴ states that "[e]very court shall be a court of record" and section 5(1) states that the proceedings must be "recorded by the presiding officer or other officer appointed to record such proceedings". Similarly, section 31(1) of the Superior Courts Act affirms that "[e]very Superior Court is a court of record." These provisions impose a duty on the courts to create and keep accurate records of all proceedings, including evidence presented, witnesses' testimonies, and orders made by the presiding officers.

4.5 The National Archives and Records Service of South Africa Act¹²⁵ (NARSSA Act) is the primary legislation regulating the management and care of records of a governmental body, which includes any judicial organ of state. The Act, along with its accompanying Regulations, provides comprehensive provisions for the storage and secure keeping of records. The Act broadly defines "record" as recorded information regardless of form or medium.¹²⁶ This clearly encompasses paper-based, electronic, audio, and audio-visual formats, currently utilised in courts.

4.6 The head of a governmental body is responsible for ensuring all records receive appropriate physical care and are protected by appropriate security measures.¹²⁷ This inherently includes security measures against loss, damage, theft or unauthorised access. The head of each governmental body is required to designate an official as the records

¹²⁴ 32 of 1944.

¹²⁵ 43 of 1996.

¹²⁶ Section 1.

¹²⁷ Part V: section 10(1)(a) and (b) of the National Archives and Record Service of South Africa Regulations. See in this regard R. 1458 in Government Gazette No. 24085 of 20 November 2002.

manager for that body.¹²⁸ The primary responsibility of this records manager is to ensure the governmental body complies with all the requirements of the NARSSA Act. The Act also allows for the possibility of prescribing additional powers and functions to a records manager.¹²⁹

4.7 The official designated as the records manager must have an appropriate university or technikon qualification and/or relevant professional experience. They must have successfully completed the National Archives' Records Management Course. They must possess a thorough knowledge of their organisation's structure, functions, and records system. Their responsibility is to promote effective, efficient, and accountable management of the organisation's records and to ensure compliance with the Act and other relevant legislation through inspections and other means.¹³⁰ In addition, officials managing records should undergo continuous in-house and external training to enhance knowledge and skills in areas such as knowledge management, document management, and electronic records management.¹³¹

4.8 In addition to ensuring compliance with the provisions of the NARSSA Act, record managers must also implement the directives and instructions issued by the National Archivist regarding the management and care of public records.¹³²

4.9 In October 2007, the National Archives and Records Service of South Africa published version 1.4 of the Records Management Policy Manual. The purpose of this manual is to explain to governmental bodies what their records management obligations are in terms of the NARSSA Act. In terms of this manual, records managers must draft an organisational records management policy. The manual also includes a generic policy as an example to guide governmental bodies regarding the formulation of a policy.¹³³

¹²⁸ The records manager and registry head should not be one and the same person and the practical work connected to his/her responsibilities may be delegated to subordinates. See in this regard National Archives and Records Service of South Africa *Records Management Policy Manual* October 2007 at 12.

¹²⁹ Section 13(5) of the Act.

¹³⁰ Part V: section 12(a) and (b) of the National Archives and Record Service of South Africa Regulations. See in this regard R. 1458 in Government Gazette No. 24085 of 20 November 2002

¹³¹ Ntengenyane K & Khayundi F "Harnessing a records management programme for justice delivery at the Alice magistrate court in the Eastern Cape Province, South Africa" (2021) 54 *Journal of the South African Society of Archivists* at 18.

¹³² Section 13(4) of the Act.

¹³³ Annexure 4 to the manual.

4.10 Although records managers must have a tertiary qualification and possess relevant professional experience, this is not often the case in practice. Some only have a matric certificate, while others lack the necessary professional knowledge and skills for managing records.¹³⁴

4.11 Despite the extensive provisions of the NARSSA Act and the Records Management Policy Manual, implementation remains long overdue, as magistrates' courts continue to be plagued by poor record-keeping practices.¹³⁵

C The Current State of Court Records of Proceedings

4.12 The administration of justice in South Africa is critically undermined by persistent challenges related to poor record management. While the integrity of records of proceedings is fundamental to a functioning legal system, there is a systemic risk that records can go missing.¹³⁶ This loss of information stems from both deliberate interference and administrative negligence. On one hand, there are concerns that records can disappear due to corruption or the direct involvement of accused persons¹³⁷. In some cases, files have vanished mysteriously, raising concerns about potential interference in judicial processes.¹³⁸ On the other hand, the problem is compounded by simple carelessness and poor organisational practices. Incorrect numbering and the improper labelling of names often make it impossible to track and secure vital case information.

4.13 Several cases have highlighted the problem of incomplete or missing records. Just to name a few, the Constitutional Court in *Schoombie and Another v S*¹³⁹ stated that the loss of trial court records is a widespread problem, raising serious concerns about endemic violations of the right to appeal.¹⁴⁰ The central issue leading to the review before Shivute and Christiaan

¹³⁴ Ntengenyane K & Khayundi F (2021) 54 *Journal of the South African Society of Archivists* at 18.

¹³⁵ See paragraphs 4.18 – 4.25 for examples of poor record-keeping practices.

¹³⁶ *Mashiloane and Another ; In re: S v Masemola and Others* A121/2022; CC131/2006) [2023] ZAGPPHC 857 (31 July 2023) at paragraph 18.

¹³⁷ *Mashiloane and Another ; In re: S v Masemola and Others* A121/2022; CC131/2006) [2023] ZAGPPHC 857 (31 July 2023) at paragraph 18.

¹³⁸ Carmel Rickard "Record mysteriously disappears: what should a court do?" African Legal Information 13 March 2020

¹³⁹ (CCT154/16)[2016]ZAAC50; 2017(5)BCLR572(CC); 2017(2) SACR 1 (CC).

¹⁴⁰ Paragraph 38.

JJ, in *S v Benhard*,¹⁴¹ was the complete loss of the record of the trial proceedings. The court was highly critical of how the matter was handled in the lower court. It stressed the legal obligation for a magistrate's court to keep an accurate record of its proceedings, as it is a "court of record".¹⁴² In *Mpaku v S*,¹⁴³ significant parts of the record were missing, including all the evidence of the state witnesses, the evidence of the appellant, the cross-examination of the appellant, and the entire judgment on conviction and sentence.¹⁴⁴ The court noted that the evidence on the record did not provide a clear picture of what transpired and whether there was any misdirection by the court *a quo*.¹⁴⁵ The court stressed that it is crucial to have all the evidence on record and the findings of the court *a quo* in relation to the credibility of witnesses and contradictions.¹⁴⁶ In *Nkute v S*,¹⁴⁷ the record was incomplete as the plea proceedings and all the evidence of state witnesses were missing. In *S v Joubert*,¹⁴⁸ the record of the case had been sent to the clerk at the court of appeal and was subsequently lost without a trace.

4.14 Recognising the urgent need to reform record management within the courts, which will ultimately also reduce the number of lost or missing records, the South African judiciary, spearheaded by the Chief Justice, has embarked on a digital transformation journey through the introduction of Court Online, an advanced cloud-based collaboration solution aimed at providing a platform for law firms and litigants to file documents with the Courts electronically. Court Online is an end-to-end E-Filing, Digital Case Management and Evidence Management system for the High Courts of South Africa. For law firms and litigants, the Court Online system offers an electronic case file displaying upcoming hearing dates and documents filed by them, served on them, or any important notifications received from the courts. Court Online, among other benefits, aims to leverage electronic storage to achieve faster document filing and retrieval while eradicating the misplacement of court files.¹⁴⁹

¹⁴¹ 2025 JDR 1159 (Nm).

¹⁴² Paragraphs 5 – 8.

¹⁴³ [2024] ZANWHC 173 (21 June 2024).

¹⁴⁴ Paragraph 13.

¹⁴⁵ Paragraph 15

¹⁴⁶ Paragraph 14.

¹⁴⁷ (A224/2020) [2021] ZAGPPHC 574; 2022 (1) SACR 436 (GP) (18 August 2021).

¹⁴⁸ (221/89) [1990] ZASCA 113; 1991 (1) SA 119 (AD); [1991] 1 All SA 290 (A) (28 September 1990).

¹⁴⁹ The South African Judiciary "Court Online" (Accessed at <https://www.judiciary.org.za/index.php/court-online/case-lines-explanation> on 13 June 2025).

4.15 Cloud-based systems, such as Court Online, often come with inherent security features that significantly reduce the risk of data loss and prevent the theft or tampering of court files in various ways. The most direct method of preventing theft is by minimising or eliminating the need for physical paper files. If there are no physical files to steal, then physical theft becomes impossible. Cloud-based systems typically have robust access control mechanisms, ensuring that only authorised users can access specific case files. This access is usually granted through secure login credentials, often with multi-factor authentication (e.g., passwords, biometrics, fingerprints), making it much harder for unauthorised individuals to gain access. Digital systems maintain comprehensive audit trails and activity logs, recording every action taken within the system—who accessed a file, when they accessed it, what changes were made, and from what device. Furthermore, electronic court records are typically secured with strong encryption, which means that even if someone were to gain unauthorised access to the data, it would be unreadable and unusable without the proper decryption keys.¹⁵⁰

4.16 Court Online is being rolled out for use in the High Courts. However, although the primary initial focus for full e-filing in Court Online has often been on civil matters, the evidence management aspect (CaseLines) is explicitly used for both civil and criminal appeals.¹⁵¹ While criminal appeals in the High Court’s utilise Court Online (CaseLines), the initial handling of criminal cases in the Magistrates’ Courts (where the vast majority of criminal cases originate) still largely depends on a combination of paper-based systems and other electronic systems like the Integrated Case Management System (ICMS). The DOJ&CD acknowledged that relying on an unstable legacy solution, such as the ICMS, presents ongoing risks, as this outdated system is prone to failure and inefficiency.¹⁵²

4.17 A broader issue is the systemic inefficiencies in record-keeping across various courts. Reports indicate that missing records are not isolated incidents. It is often the culmination of a series of failures, which can range from simple human error to deep-seated systemic dysfunction. The loss or incompleteness of court records can be attributed to a wide spectrum of causes, including the following:

¹⁵⁰ For The Record “Court cybersecurity—is it possible to protect the digital court record?” 4 November 2022 (Accessed at <https://fortherecord.com/court-cybersecurity-protect-court-records/#:~:text=Sophisticated%20file%20encryption%20that%20renders,Multiple%20anti%20Dmanipulation%20features> on 13 June 2025).

¹⁵¹ The South African Judiciary “Court Online” (Accessed at <https://www.judiciary.org.za/index.php/court-online/case-lines-explanation> on 13 June 2025).

¹⁵² DOJ&CD “Revised Annual Performance Plan 2025/2026” at 61.

1 Poor Record-Keeping Practices

4.18 The Magistrates' Courts are grappling with inefficiencies due to their reliance on manual administrative processes. This outdated approach creates a cascade of problems, from slowed operations and increased risk of errors¹⁵³ to the potential for manipulation of court documents.¹⁵⁴ The core of the issue lies in the continued use of paper-based record-keeping. Despite the critical need for accurate case records to ensure effective court functioning, records are still maintained in hard copy files. The lack of automated record-keeping tools directly contributes to the postponement of cases, causing unnecessary delays.¹⁵⁵

4.19 Paper-based court record systems face significant risks, making them highly susceptible to loss, misplacement, theft, tampering and unauthorised access. A primary concern is the misfiling of records, which often leads to case delays.¹⁵⁶ Beyond simple misplacement, these manual systems are vulnerable to malicious acts. Individuals seeking to obstruct justice or hide evidence can easily steal, alter or remove pages from files. Furthermore, paper records are not immune to environmental damage. Pests, fire, floods, humidity and other natural disasters can cause irreversible loss of information.¹⁵⁷ In addition, paper-based systems lacked robust security mechanisms, making it difficult to track who accessed a particular file, when, and for what purpose.¹⁵⁸ The absence of a clear audit trail makes investigating instances of missing records or tampering challenging.

4.20 Improper storage of documents exacerbates the problem. Several courts fail to ensure the proper storage of court records. In a study conducted at the Alice Magistrate Court in the Eastern Cape, court officials who took part in the study indicated that records are stored in cabinets, in the registry, and in the strong room. The study also found that some records are kept in the offices of the court manager and the prosecutor.¹⁵⁹

¹⁵³ DOJ&CD "Annual Performance Plan 2025/2026" at 55.

¹⁵⁴ Zikalala K *Digital Transformation of the Magistrate Courts in South Africa* (LLM Thesis, University of the Witwatersrand 2024) at ii.

¹⁵⁵ Zikalala K (LLM Thesis, University of the Witwatersrand 2024) at 48.

¹⁵⁶ Ntengenyane K & Khayundi F "Harnessing a records management programme for justice delivery at the Alice magistrate court in the Eastern Cape Province, South Africa" (2021) 54 *Journal of the South African Society of Archivists* at 21.

¹⁵⁷ "6 consequences of bad records and document management policies" (Accessed at <https://www.ironmountain.com/resources/blogs-and-articles/e/effects-of-bad-records-document-management-policies> on 24 June 2025).

¹⁵⁸ Mafu NV *The management of court records in Magistrate Court: A case of Middledrift Magistrate Court, Eastern Cape* (LLM Thesis, University of Fort Hare 2014) at 32.

¹⁵⁹ Ntengenyane K & Khayundi F (2021) 54 *Journal of the South African Society of Archivists* at

4.21 The Public Protector pointed out that the majority of courts do not have proper filing systems and spaces.¹⁶⁰ In its investigation into administrative deficiencies within the South African criminal justice system, the Public Protector found court files scattered on the floor of the court buildings in Mamelodi, Pretoria, Palm Ridge, Vereeniging, Johannesburg, Bellville, and files kept in police cells at Ga-Rankuwa.¹⁶¹ The Public Protector's investigation in particular highlights the following problems experienced at magistrates' courts:

- A lack of proper filing systems, which, as a result, makes file management difficult.¹⁶²
- No proper filing space to file documents.¹⁶³
- Files lying on the floor because of the lack of proper filing space.¹⁶⁴
- No filing room for court records.¹⁶⁵
- Shortage of filing space¹⁶⁶
- Court records kept in the SAPS holding cells.¹⁶⁷
- Files kept on desks (a register is maintained to establish which files are located at a particular place in the court.¹⁶⁸
- Files kept in steel cabinets placed in various offices.¹⁶⁹

4.22 The impact of improper records keeping by the courts adversely affects the efficiency of service delivery and results in unreasonable delays when court users' records cannot be located or retrieved. Consequently, matters may need to be postponed, or interim protection orders may fail to be confirmed when court files cannot be located.¹⁷⁰

17.

¹⁶⁰ The Public Protector carried out inspections in loco at various sampled courts across South Africa, in all nine provinces.

¹⁶¹ Public Protector South Africa *Systemic Investigation into Administrative Deficiencies relating to Gender-Based Violence within the South Africa Justice System* Report No.1 of 2024/25 at 11.

¹⁶² Bloemfontein, Mamelodi Magistrates' Courts.

¹⁶³ Mamelodi, Pretoria, Palm Ridge, Vereeniging, Johannesburg, uMbumbulu and Nelspruit Magistrates' Courts.

¹⁶⁴ Mamelodi, Pretoria and uMbumbulu Magistrates' Court.

¹⁶⁵ Ga-Rankuwa Magistrate's Court.

¹⁶⁶ It has been found that the lack of space for newly created documents is mostly due to non-disposal of old documents.

¹⁶⁷ Ga-Rankuwa Magistrate's Court.

¹⁶⁸ Mthunzini Magistrate's Court.

¹⁶⁹ Atamelang Magistrate's Court.

¹⁷⁰ Public Protector Report No.1 of 2024/25 at 12.

4.23 The remedial action proposed by the Public Protector is that the DOJ&CD must conduct an audit of the current filing systems in place at the various magistrates' courts and develop or upgrade their filing system in accordance with Part V (10)(1)(a) and (b) of the National Archives and Record Services Regulations.¹⁷¹

4.24 The DOJ&CD acknowledged that some of the court sites have poor record management and identified the following core drivers to poor record management (a) insufficient purpose-built record rooms to accommodate records, (b) insufficient number of qualified record officers, which often result in disposal schedules not being adhered to, and (c) consistent deep budget cuts that result in the lack of funds to fully implement an Electronic Records/ Document Management System.¹⁷²

4.25 In response to the Public Protector's proposed remedial action, the DOJ&CD has undertaken to address the problems related to record management as follows:¹⁷³

- (a) The DOJ&CD has included the need for purpose-built record rooms in the specifications of the Facilities Blueprint when leasing or building a new court.
- (b) The DOJ&CD will conduct regular records management awareness sessions at court level to upskill their administrative court officials.
- (c) The DOJ&CD is currently running a programme to digitise some of the documents of the Masters Offices. Budget constraints may hinder the rollout of this programme to the lower courts and therefore Criminal Assets Recovery Accounts (CARA) funding has been sought to implement this Project at specifically prioritised pilot sites during the next three financial years.
- (d) The DOJ&CD has started an initiative to digitise and store existing court records electronically in courts, as existing court filing space is running out, whilst at the same time, ensuring that court records will be made available manually when required.
- (e) Options for off-site storage of files which cannot be destroyed in terms of the NARSSA Act are being investigated. This Project is in its infancy stage, but it is thought that it will also be able to assist with the management of court files.

¹⁷¹ Public Protector Report No.1 of 2024/25 at 197.

¹⁷² Public Protector Report No.1 of 2024/25 at 128.

¹⁷³ Public Protector Report No.1 of 2024/25 at 128 - 129.

2 Faulty Court Recording Equipment

4.26 Many courts still rely on old recording systems that are prone to malfunction. Mechanical failures in recording devices, such as malfunctioning microphones and recording machines, have led to significant gaps in trial records. These technical issues can result in the loss of crucial testimonies, ultimately undermining the integrity and completeness of legal proceedings. The following cases illustrate some of the issues encountered in practice with faulty court recording equipment. In *Mashiloane and Another; In re: S v Masemola and Others*,¹⁷⁴ the record could not be transcribed because the recording machine used in the trial was damaged, which rendered the recordings inaudible. Efforts were made to salvage the records, including assistance from the service providers, but these attempts were largely unsuccessful: only two days of evidence have been salvaged. In *S v Chabedi*,¹⁷⁵ the magistrate's microphone was not functioning properly. As a result, questions and comments made by the magistrate during the hearing were, on occasion, transcribed as 'inaudible'. In the case of *Miti Isaac Papanyana v S*,¹⁷⁶ the record of the proceedings involving the entire State's case, including the evidence-in-chief of the appellant, was not recorded because they only discovered late in the trial that the recording machine had been malfunctioning.

4.27 The DOJ&CD is responsible for managing the court equipment, such as court recording technology and cameras.¹⁷⁷ With respect to the current state of court recording technology, the DOJ&CD indicated in its 2023/2024 Annual Report that 90 of 2,000 court recording machines continuously break down. Consequently, the department is prioritising the repair of these machines.¹⁷⁸

4.28 Furthermore, the DOJ&CD plans to obtain a support and maintenance contract to replace the current machines. They are also in the process of procuring a court recording audio-visual system, with the assistance of SITA, which will be integrated and have audio and video functionality.¹⁷⁹

¹⁷⁴ A121/2022; CC131/2006) [2023] ZAGPPHC 857 (31 July 2023)

¹⁷⁵ 2005 (1) SACR 415 (SCA) at par 7.

¹⁷⁶ Case No: A1024/2011 and enrolled for hearing in the Pretoria High Court on 8 September 2020 (unreported).

¹⁷⁷ DOJ&CD's Annual Report 2023/2024 at 126.

¹⁷⁸ DOJ&CD's Annual Report 2023/2024 at 132.

¹⁷⁹ DOJ&CD's Annual Report 2023/2024 at 132.

D Legal and Procedural Implications

4.29 Incomplete records of proceedings and, even worse, the loss of such records undermine public confidence in the judiciary, as it raises concerns about accountability. Moreover, this has the following legal implications.

1 Violation of the Right to a Fair Trial

4.30 In South Africa, the importance of the court record is elevated to a constitutional imperative. Section 35(3) of the Constitution¹⁸⁰ states that every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court. By locating the right to appeal within the right to a fair trial, the Constitution elevates it from a mere procedural formality to a fundamental, substantive right that serves as a crucial safeguard against judicial errors and potential miscarriages of justice.¹⁸¹

4.31 However, the right of appeal is rendered meaningless without an adequate record of the proceedings of the trial court. An appellate court does not rehear the evidence or call witnesses anew; its role is to assess whether the trial court, based on the record before it, reached the correct conclusion.¹⁸² The Constitutional Court in *Schoombie and Another v S*¹⁸³ affirmed that an adequate record of the proceedings of the trial court is a key component of the right to appeal. An incomplete or lost record of proceedings can, therefore, constitute a violation of the right to a fair trial.¹⁸⁴

¹⁸⁰ Constitution of the Republic of South Africa, 1996.

¹⁸¹ The court in *S v Steyn* 2001 (1) SACR 25 (CC) affirmed that the right to appeal minimise the risk of wrong convictions and inappropriate sentences. It is therefore a safeguard and essential for a fair trial.

¹⁸² Section 19 of the Superior Courts Act 10 of 2013 outlines the powers of the Supreme Court of Appeal and a High Court when hearing an appeal. While it grants the court the power to receive further evidence (under section 19(b)), the leading of further evidence on appeal will only be allowed in special circumstances. See in this regard Van Loggerenberg *Erasmus Superior Court Practice* 2 ed (Juta loose-leave Service 18, 2022) vol I at A2-70 – A2 72B. The fact that the power to hear further evidence is a narrow exception confirms the general rule that the ordinary function of an appellate court is to decide the matter based on the record of the court *a quo*.

¹⁸³ (CCT154/16) [2016] ZACC 50; 2017 (5) BCLR 572 (CC); 2017 (2) SACR 1 (CC) (15 December 2016).

¹⁸⁴ See also *Muravha v Minister of Police* (179/2022) [2024] ZASCA 11; 2024 (4) SA 84 (SCA) (30 January 2024).

2 Challenges in Reconstructing Incomplete and Lost Court Records

4.32 On appeal, the record of the proceedings of the trial court is of cardinal importance. It forms the entire basis for the hearing by the Court of Appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside.¹⁸⁵ Regrettably, it has become increasingly prevalent for courts of appeal to encounter cases involving missing and/or incomplete records.¹⁸⁶

4.33 When a record is found to be deficient, the courts have established a duty on the parties to attempt to reconstruct it. The court in *Sijila v S*¹⁸⁷ stated as follows:

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.¹⁸⁸

4.34 Hence, the reconstruction of the record must be a collaborative endeavour undertaken diligently and with meticulous attention by all involved parties.¹⁸⁹ The process generally involves gathering any available secondary sources of information, such as the magistrate's notes,¹⁹⁰ the notes of the accused's legal representative,¹⁹¹ and accounts from witnesses and

¹⁸⁵ Paragraph 18 of the judgment in *Sijila v S* (CA & R93/2023) [2024] ZAECMKHC 35 (19 March 2024).

¹⁸⁶ *Nkhahle v S* (A68/2020) [2020] ZAFSHC 246; 2021 (1) SACR 336 (FB) at paragraph 16.

¹⁸⁷ (CA & R93/2023) [2024] ZAECMKHC 35 (19 March 2024).

¹⁸⁸ Paragraph 17.4.

¹⁸⁹ *Sijila v S* (CA & R93/2023) [2024] ZAECMKHC 35 (19 March 2024) at paragraph 9.

¹⁹⁰ These are arguably the most important secondary source. However, they are often cryptic, consisting of abbreviations and personal shorthand. They are not intended to be a verbatim transcript and are merely an aid to the memory of the judicial officer.

¹⁹¹ Lawyers' notes are prepared for their own purposes and are, by nature, selective and partisan. They focus on aspects of the proceedings that are pertinent to their client's case and may omit details that are crucial for a comprehensive and balanced record.

others who were present at the trial,¹⁹² in order to fill in the missing parts of the record.¹⁹³ However, this process is fraught with practical and procedural difficulties that often render it an exercise in imperfection. This is demonstrated by the following words of the trial court magistrate:¹⁹⁴

The notes I have for cases that have been finalised in RCP Welkom are in a state of disarray; How that has happened is unbeknown to me. I therefore will not be able to reconstruct any of those cases because of the possibility of relevant evidence missing or important parts of same being mixed up with other cases. I have tried to put them together but still believe that it is far too risky to reconstruct the entire proceedings as is required in this matter.

4.35 The most significant practical hurdle in reconstructing a court record is the inherent fallibility and unreliability of human memory. With the passage of time, the recollections of all participants—trial magistrate or judge, prosecutor, defence’s legal representatives, and witnesses—inevitably fade and can become distorted. Key testimony, the precise wording of questions and answers, and the nuances of judicial interventions are often lost to the mists of time. The longer the delay between the original proceedings and the attempt at reconstruction, the more acute this problem becomes. This reliance on imperfect memory can lead to a reconstructed record that is a mere approximation, and potentially an inaccurate one, of the actual proceedings.¹⁹⁵

¹⁹² In *S v Joubert* (221/89) [1990] ZASCA 113; 1991 (1) SA 119 (AD); [1991] 1 All SA 290 (A), the matter was referred to the clerk of the trial court with instructions to gather the best secondary evidence as to the contents of the record, including affidavits from witnesses and others who were present or who have knowledge of what transpired at the trial, in order to show what the content was of the evidence led and the proceedings that took place as well as the plea and the further proceedings.

¹⁹³ The court in *Sjila v S* (CA & R93/2023) [2024] ZAECMKHC 35 (19 March 2024) in paragraph 15 stated that prosecutors are to keep notes to assist the presiding officer to reconstruct a record if so required.

¹⁹⁴ Paragraph 17.3.

¹⁹⁵ Daniel L. Schacter, in his study titled “The seven sins of memory: Insights from psychology and cognitive neuroscience” divided memory’s transgressions into seven categories. The first three categories (transience, absent-mindedness and blocking) reflect different types of forgetting. Transience involves decreasing accessibility of information over time, absent-mindedness entails inattentive or shallow processing that contributes to weak memories of ongoing events, and blocking refers to the temporary inaccessibility of information that is stored in memory. The next three categories (misattribution, suggestibility, and bias) involve distortion or inaccuracy. Misattribution involves attributing a recollection or idea to the wrong source, suggestibility refers to memories that are implanted as a result of leading questions or comments during attempts to recall past experiences, and bias involves retrospective distortions and unconscious influences that are related to current knowledge and beliefs. The seventh category persistence, refers to pathological remembrances: information or events that we cannot forget, even though we wish we could.

4.36 The Constitutional Court's decision in *Phakane v S*¹⁹⁶ serves as a stark reminder of the consequences when reconstruction is not possible. In this case, the evidence of the main state witness, whose testimony played a decisive role in the trial court's conviction of the applicant for murder, was missing from the record.¹⁹⁷ Attempts to reconstruct the testimony of the witness failed. The court held that the lack of this evidence made a just consideration of the appeal impossible. It reasoned that without the full testimony of this witness, the appellate court is not in a position to determine the appeal fairly.¹⁹⁸ As a result, the appellant's constitutional right to a fair appeal was rendered illusory and consequently violated.¹⁹⁹ In such circumstances, the court concluded that the appropriate remedy was to set aside both the trial proceedings and the conviction and sentence.²⁰⁰

4.37 Even though the above cases concern appeals, the effect of an incomplete record applies equally to reviews.

3 Case Delays

4.38 A 2023 study on the Temba Magistrates' Court explicitly identified poor records management practices as a direct cause of a backlog of cases. The study revealed challenges in tracking and retrieving court records, as well as the misplacement and loss of electronic records, leading to protracted delays in the delivery of justice.²⁰¹ For the accused, the loss of records can cause unreasonable delays that violate their right to a speedy trial.²⁰²

4.39 The 2024 judgment by the Supreme Court of Appeal (SCA) in *Muravha v Minister of Police*²⁰³ illustrates how the loss of the court's record of proceedings, compounded by technological failure and procedural errors, can cause a case to drag on for years only to reach the most extreme form of delay: a complete retrial, sending the case back to its start nearly a

¹⁹⁶ (CCT61/16) [2017] ZACC 44; 2018 (1) SACR 300 (CC); 2018 (4) BCLR 438 (CC) (5 December 2017).

¹⁹⁷ Paragraphs 2 and 17.

¹⁹⁸ Paragraph 35.

¹⁹⁹ Paragraph 38.

²⁰⁰ Paragraphs 41 and 46.

²⁰¹ Teffo and Chuma "Management of electronic records to support judicial systems at Temba Magistrates' Court in the North West Province of South Africa" (2023) 56 *Journal of the South African Society of Archivists*

²⁰² Section 35(3)(d) of the Constitution.

²⁰³ (179/2022) [2024] ZASCA 11; 2024 (4) SA 84 (SCA) (30 January 2024).

decade after the initial incident. The case originated from a civil claim for damages filed by the appellant against the Minister of Police after he was shot with a rubber bullet by a SAPS officer during a protest.²⁰⁴ The trial court found in favour of the Minister and dismissed the claim in 2017.²⁰⁵ Leave to appeal to the full court of the High Court was granted, but it was at this stage that the system began to break down. The appellant discovered that the entire record of the trial proceedings—including the evidence-in-chief, cross-examination, and re-examination of all witnesses²⁰⁶—had been lost.

4.40 Despite the missing record, the full court proceeded to hear the appeal. It based its decision solely on the trial judge's summary of the facts and, on that basis, dismissed the appeal.²⁰⁷ The case was then appealed to the SCA, which found that the record of the trial proceedings was necessary for the full court to determine the outcome of the appeal.²⁰⁸ In this regard, the SCA stated that “[t]o 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”.²⁰⁹

4.41 The SCA initially postponed the hearing and ordered the parties to attempt to reconstruct the lost record.²¹⁰ This effort, however, proved futile. A subsequent report filed with the SCA revealed the catastrophic reason for the failure: the trial proceedings had been recorded on “old DCRS machines which had since been decommissioned,” hence, retrieving the audio recordings was impossible.²¹¹ The SCA noted with disapproval the failure by the legal representatives of the appellant and the State to keep notes of the proceedings, which could have aided in the reconstruction. This, according to the SCA, constituted a dereliction of duty.²¹² Faced with an irretrievably lost record and an impossible reconstruction, the SCA

²⁰⁴ Paragraph 2.

²⁰⁵ Paragraph 4.

²⁰⁶ Paragraph 10.

²⁰⁷ Paragraph 5.

²⁰⁸ Paragraph 10.

²⁰⁹ Paragraph 20.

²¹⁰ Paragraph 13. The reconstruction of court records itself is a major cause of case delays and judicial backlogs. Reconstruction is not simply a matter of clerical paperwork; it is a formal, often contentious, and resource-intensive legal process that can substantially delay a case.

²¹¹ Paragraphs 15.

²¹² Paragraph 17.

was left with no other choice but to remit the matter to the trial court for a rehearing before another presiding judge, as credibility findings were made by the trial court.²¹³

4.42 The timeline of the delay in the *Muravha* case is astonishing: the incident occurred in 2014, the trial court delivered judgment in 2017, and the final order for a retrial was issued in January 2024. A single lost record, due to a single technological failure, caused over seven years of litigation that ultimately achieved nothing but sending the case back to square one.

4.43 Furthermore, when cases are delayed due to lost records, the costs for litigants escalate. They may have to pay their legal representatives for additional court appearances, for the work involved in reconstruction, and for the extended period of litigation.²¹⁴

4 Remission of the Case for Retrial

4.44 When a magistrate or judge is replaced mid-trial as proposed in Chapter 2 of this paper,²¹⁵ the new judicial officer who takes over during the proceedings would rely on the existing record to gain a thorough understanding of the proceedings up to that point. Thus, a comprehensive record of proceedings helps ensure continuity in the trial and maintains the integrity of the judicial process. The quality and completeness of the record of proceedings significantly influence whether a new presiding officer would be willing to continue the trial from the point where the previous presiding officer left off and accept and rely on the record of the previous proceedings, as well as deliver a verdict based on that record and any new evidence presented during the trial. If the trial record is inadequate, the new judicial officer will likely not accept it, especially if the demeanour and credibility of witnesses cannot be discerned from the record. Thus, an inadequate or missing trial record not only hampers the smooth continuation of trials but also poses challenges for courts that must address appeals or reviews when the records are incomplete or lost.

4.45 When an appellate court finds that the record of proceedings is inadequate for a proper appeal or review, it cannot simply decide the case. Instead, the case must be remitted to the trial court for a proper reconstruction of the record. However, when a record is irretrievably lost and its reconstruction proves impossible, as was the case in the *Muravha* case, the judicial

²¹³ Paragraph 20.

²¹⁴ See also *S v Thobela* 2008 (1) SACR 605 (W) at paragraph 12, where the court expressed concern about the expenses the accused would face if the proceedings had to start afresh.

²¹⁵ Paragraph 2.46.

system is often left with only one option: to declare the original proceedings a nullity. This results in the most drastic form of delay and waste—a trial anew. The court has no alternative but to set aside the original judgment and order the entire trial to commence again from the beginning, before a new judicial officer. This outcome signifies a complete failure of the judicial process, wasting all the time, money, and human resources invested in the initial trial and forcing victims, witnesses, and the accused to endure the entire ordeal once more.²¹⁶ This underscores the gravity of the loss of the record. It also means that a defendant has effectively lost his or her right to an appeal.²¹⁷

E Recommendations

4.46 The issue of missing and incomplete court records fundamentally stems from deficiencies in systems and processes, as well as a lack of resources. Therefore, the following recommendations establish a comprehensive, multi-layered strategy that targets every level of the justice system, from daily courtroom practice to long-term institutional and technological reform. This approach includes establishing rigorous operational protocols for court clerks to prevent and correct recording errors in real-time, as well as mandating the preservation of secondary evidence as a final safeguard for the reconstruction of court records. The strategy extends to systemic reform through the creation of a standardised record management policy for the lower courts and calls for the urgent modernisation of these courts through a full-scale investment in a secure, cloud-based digital infrastructure, supplemented by innovative tools such as AI-powered transcription, to facilitate the timely correction of records after judgment.

1 Standard Operating Procedure for Court Recording Clerks

4.47 In 2010, the DOJ&CD published a document titled “Practical Guide: Court and Case Flow Management for Regional and District Criminal Courts”. According to this Guide, court managers at every magistrate’s office are expected to ensure the proper functioning of courtrooms as well as the effective operation of court equipment (e.g., computers, recording machines, etc.). They must also implement adequate measures for the safekeeping of court

²¹⁶ *Muravha v Minister of Police* (179/2022) [2024] ZASCA 11 (30 January 2024); Le Riche J “A litigant’s right to a fair trial and a lost trial record” PH Attorneys 25 March 2024.

²¹⁷ CS Namakula ‘The court record and the right to a fair trial: Botswana and Uganda’ (2016) 16 *African Human Rights Law Journal* 175-203.

records (charge sheets and recordings, etc.) and ensure that all clerks operating the recording machines are duly sworn in before assuming their duties.²¹⁸

4.48 The Guide further states that court clerks are required to do all things reasonable and necessary to ensure compliance with effective court and case flow management by, among others:²¹⁹

- ensuring that electronic systems utilised in court are in proper working condition for quality recordings and reporting any faults to the service provider and other affected role players, at the earliest opportunity;
- ensuring that correct data is annotated at the beginning of each recording, and that cases are correctly saved;
- monitoring recordings properly through the use of headphones to ensure quality;
- ensuring that review and appeal records are properly prepared, dispatched in a timely manner, and the registers correctly maintained; and
- ensuring the safe-keeping of court records, including proper filing and disposal of court records.

4.49 The court in *S v Sebotha*²²⁰ held that it was not in the interests of society that criminals be let off the hook simply because of poor recording facilities at court.²²¹ The court in *S v Nelushi*²²² emphasised the responsibility of ensuring the proper functioning of the recording equipment. This includes testing the microphones before the commencement of hearings and after subsequent adjournments and resumptions, and everybody participating in the proceedings should be asked to speak distinctly and clearly into the microphone.²²³

4.50 Furthermore, the court in *Sijila v S*²²⁴ referred to *S v Nkhahle*²²⁵ wherein Daffue AJP made the following remarks regarding the duties of the stenographer:

[15] What is most disturbing is the fact that the stenographer — also known as the DCRS or CRT clerk — did not do his/her most basic duties: either to switch on the

²¹⁸ DOJ&CD *Practical Guide: Court and Case Flow Management for Regional and District Criminal Courts* Enhanced Edition 2010 at 54 -55.

²¹⁹ DOJ&CD *Practical Guide* Enhanced Edition 2010 at 57 -58.

²²⁰ 2006 (2) SACR 1 (T).

²²¹ Paragraph 9.

²²² 2005 JDR 1460 (V)

²²³ Paragraph 2.

²²⁴ (CA & R93/2023) [2024] ZAECMKHC 35 (19 March 2024).

²²⁵ 2021 (1) SACR 336 (FB).

machine and to test the machine and all the microphones before the start of proceedings, or to listen back to the recordings from time to time, i.e. during tea time, lunch time or immediately after the day's proceedings. If that was the case, he/she would have picked up early on the very first day of the proceedings ... that nothing was recorded. Then the matter would still be fresh in the minds of everybody and their notes intact. A reconstruction would have been easy to do. The same applies to the second trial date The excuse that no server was installed in Ventersburg where the trial was conducted is just too lame to accept. I would have thought that back-ups are made on a daily basis by making use of memory sticks or CD's.²²⁶

4.51 Despite the existence of the guidelines on the proper functioning and effective operation of court equipment as detailed in 4.47 and 4.48, the persistent issue of incomplete records of proceedings remains a significant cause for concern, as emphatically highlighted by the judiciary. The case law demonstrates that these administrative guides, while clear, often lack the necessary enforcement mechanisms to ensure consistent compliance. The judicial criticism in *S v Nkhahle* points to a critical gap where failures to perform basic duties occur without adequate consequence. It is therefore essential that these procedural aspects related to the creation of the record and its preservation be elevated from administrative guidance to binding provisions in law. This will establish a clear framework for accountability and ensure that non-compliance with these critical duties can be effectively addressed.

4.52 Therefore, the Commission recommends the inclusion of the following provision in the new CPA:

Rules of court regulating the recording of criminal proceedings

(1) The procedure to be followed by the clerk of the court or any other designated official responsible for operating, monitoring, or managing court recording equipment during criminal proceedings must be conducted in the manner prescribed by the rules of court.

(2) The purpose of the rules referred to in subsection (1) shall be to ensure the integrity, completeness, audibility, and preservation of the record of proceedings.

(3) Without limiting the generality of subsections (1) and (2), the rules may, in particular, prescribe—

- (a) the duty to test recording equipment, including microphones, before the commencement of proceedings on any given day;
- (b) the procedures to verify that the recording is active and functioning correctly at the commencement of and during the course of the proceedings;
- (c) the duty to monitor and review the audibility and continuity of the recording at specified intervals, including during adjournments and upon the conclusion of each day's proceedings, to detect any malfunction or defect;
- (d) the procedures for the secure saving, labelling, and verification of the recorded file immediately upon the conclusion of each day's proceedings;

²²⁶

Paragraph 12.

- (e) the immediate steps to be taken and the persons to be notified upon the discovery of any failure, malfunction, or defect in the recording process; and
- (f) any other matter which the Rules Board may deem necessary or expedient to prescribe in order to achieve the purpose stated in subsection (2).

4.53 These measures will help clerks identify any malfunctioning or dysfunctional recording machines early in the proceedings, enabling the court to reconstruct that part of the proceedings while the matter is still fresh in everyone's minds.

4.54 The implementation of these recommendations should be considered as an enhancement of the DCRS²²⁷ or CRT²²⁸ clerk's existing duties. Moreover, court managers should implement measures to ensure that disciplinary actions are taken against clerks who fail to comply with their duties. However, disciplinary action is only fair and effective if clerks are given the training and tools necessary to perform their duties. The Commission therefore recommends that the DOJ&CD develop and implement a mandatory standardised training program for all court recording clerks. This training must cover not only the technical operation of court equipment but also the new rules of court regulating the recording of criminal proceedings once promulgated as well as the critical legal and constitutional importance of the role of recording clerks in ensuring a complete record of proceedings.

4.55 Furthermore, while section 6 of the Rules Board for Courts of Law Act, 107 of 1985, provides broad powers to the Rules Board to make rules for the effective administration of courts, it should be amended to explicitly incorporate the technical management of digital and mechanical recordings in criminal proceedings. Accordingly, the Commission recommends that section 6 of the Act be amended by inserting into subsection (1), after paragraph (s), the following paragraph:

(sA) the procedures and duties of court officials responsible for operating, monitoring, or managing court recording equipment during criminal proceedings to ensure the integrity, audibility, and preservation of the record of proceedings.

4.56 This consequential amendment provides the Rules Board with the requisite legislative authority to establish a uniform national standard for the handling and storage of digital and mechanical recordings.

²²⁷ Digital Court Recording System.

²²⁸ Court Recording Technology.

2 Correcting Record of Proceedings After Judgment

4.57 The importance of ensuring the completeness and accuracy of the court's record of proceedings is reflected in Rule 66(6)²²⁹ which gives the prosecutor or the accused the right to request the correction of any errors in the official court record or its certified transcript within a 10-day window period post-judgment or post-transcription. The court is then empowered to make any necessary corrections. The fundamental problem is that court proceedings are not transcribed unless a judicial officer directs it²³⁰ or upon request by any person for a prescribed fee.²³¹ The transcription of the court proceedings is essential if a party intends to initiate an appeal.

4.58 Although the CPA specifies time limits within which an application for leave to appeal must be made after sentencing,²³² the court can still grant such an application years later.²³³ This creates a legal loophole because by the time the transcript is prepared and errors are identified, the 10-day window for correction may have passed. Additionally, secondary evidence crucial for reconstruction, such as handwritten notes from the magistrate, prosecutor, and legal representatives (which serve as tools to clarify unclear or defective audio recordings), may no longer be available.

4.59 The seemingly obvious and ideal solution—transcribing every court proceeding immediately after judgment—is not feasible due to budget and human resources limitations. It is therefore important to develop a system that functions within these constraints. Therefore, the Commission recommends that the DOJ&CD should invest in AI-powered speech-to-text

²²⁹ Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (Magistrates' Courts Rules).

²³⁰ Rule 66(3)(b) of the Magistrates' Courts Rules.

²³¹ Rule 66(4)(a) of the Magistrates' Courts Rules.

²³² Sections 309B(1)(b)(i) and 316(1)(b)(i).

²³³ Both sections 309B(1)(b)(ii) and 316(1)(b)(ii) allow an applicant to be excused for failing to meet the prescribed timeframes for lodging their application for leave to appeal, provided they can demonstrate "good cause" for the delay. However, it is not merely a matter of requesting the court's indulgence. The court exercises its discretion judicially and will consider the explanation for the delay and the prospects of success on appeal. In *Moatshe v S* (CA 82/2018) [2024] ZANWHC 100 (9 April 2024), the appeal was heard 14 years after sentencing. The primary reason for the extreme delay was not the fault of the appellant. The court noted that the main reason was the missing trial records and the subsequent inability of the state to reconstruct and transcribe the court record. The appellant also provided a full and detailed affidavit explaining the steps he had taken since the date of his sentence to prosecute his appeal. In *Matshogwe v S* (CC 139/2014) [2023] ZANWHC 22 (24 February 2023), the court found the explanation for the delay to be weak and lacking in detail. More importantly, the court concluded that the applicant had no reasonable prospects of success on appeal.

technology to generate a rough transcript of the proceedings almost instantly and at a fraction of the cost of human transcription. This would allow the parties to quickly search the entire record for potential substantive errors. If a significant error is found, it can then be corrected in accordance with the procedure outlined in Rule 66(6).

3 Preservation of Secondary Evidence: Handwritten Notes of Magistrate or Judge

4.60 An analysis of case law²³⁴ reveals instances where the notes of presiding officers, which could have helped reconstruct an incomplete record of proceedings, were lost. This is most likely because no directive or legislative provision states that the handwritten notes of magistrates and judges should be securely retained for a specified period after delivery of judgment. A magistrate's or judge's handwritten notes are generally considered personal working tools.²³⁵ They are used by the presiding officer to follow and make sense of oral evidence and arguments, record personal impressions of a witness's demeanour, structure the key points for drafting the final judgment and keep track of complex factual or legal issues during the trial.²³⁶ Thus, the notes do not form part of the official court record (i.e. the mechanical or digital audio recording, the transcript derived from these recordings, once certified as correct, all pleadings, exhibits, and the final signed judgment or order),²³⁷ unless they are read into the record by the presiding officer.²³⁸

4.61 It is in the context of a lost or incomplete official court record that a judge's or magistrate's bench notes become critical in reconstructing the record, thereby enabling an appeal or review to proceed. This was clearly illustrated in a Zimbabwean case, where an appeal that could not be heard for over a decade due to missing papers from the court record

²³⁴ *Mothusi and Another v The State* [2015] BLR 439 (CA); *S v Seopa* 2008 JDR 0259 (T), *S v Zondi* 2003 (2) SACR 227 (W); *S v Abrahams* 2001 JDR 0647 (C).

²³⁵ The practice of taking bench notes is implicitly rooted in the legal duty of the presiding officer to ensure that a record is kept. Section 5(1) of the Magistrates' Courts Act 32 of 1944 mandates that proceedings "shall be... recorded by the presiding officer or other officer appointed to record such proceedings". While this provision primarily grounds the creation of the official record, it also establishes a fundamental responsibility for the presiding officer to be actively involved in the recording process, a responsibility that personal note-taking directly facilitates.

²³⁶ Judges Matter "Response to 'A Bridge too Far'" 28 November 2017.

²³⁷ Neither Rule 66 of the Magistrates' Courts Rules nor Rule 39(16) of the Uniform Rules of Court makes any explicit mention of a judge's or magistrate's handwritten notes as part of the official court record.

²³⁸ *S v Harber and Another* (341/1986) [1988] ZASCA 34; [1988] 4 All SA 496 (AD) (30 March 1988).

was eventually heard after the trial judge's four notebooks were found.²³⁹ This is the primary circumstance in which bench notes are officially and necessarily brought into the public judicial process, not as a matter of routine, but as a remedial measure to uphold the interests of justice and prevent the infringement of a litigant's right to a fair trial.

4.62 In view of the importance of handwritten notes by judicial officers in reconstructing records of proceedings, the Commission recommends that the Chief Justice issue a directive requiring all court managers to securely retain these notes for a period of five years. Court managers would be able to delegate this responsibility to the DCRS clerks/stenographers or the secretaries of magistrates and judges. A directive can be drafted or amended much more quickly than legislation. If the initial five-year retention period is found to be too lengthy or too short, the judiciary can adapt swiftly.

4 Standardised Record Management Policy

4.63 It is important to note that the NARSSA Act addresses the issue of record management in a broad, overarching manner and does not specifically focus on record management within the courts. While the Act applies to court records, it does not delve into the specific operational nuances of court record management. Hence, there is a need for a comprehensive, standardised court-specific record management policy to which all courts must adhere. Records management in South African courts is characterised by a decentralised approach, where individual courts may develop and implement their own record management policies. However, court officials responsible for record management seldom adhere to these policies. The policies are also not regularly updated to keep pace with changing circumstances. For instance, despite having a record management policy, many officials at the Themba Magistrate Court do not adhere to it. Furthermore, their record management policy is not reviewed or updated regularly.²⁴⁰

4.64 The absence of a standardised policy for record management results in courts adopting different methods for creating, maintaining, storing, and disposing of records. Without a common standard, the level of security applied to court records, both paper-based and electronic, will vary from one court to another, particularly where record managers fail to

²³⁹ Daniel Nemukuyu Harare Bureau "Chivayo's appeal: Judge's notes found" *The Herald* 23 July 2016.

²⁴⁰ Teffo and Chuma "Management of electronic records to support judicial systems at Temba Magistrates' Court in the North West Province of South Africa" (2023) 56 *Journal of the South African Society of Archivists* at 45.

comply with the provisions of the NARSSA Act. This creates vulnerabilities to loss, theft, tampering, and unauthorised access. Physical records may be poorly stored, and digital records may lack consistent encryption, backup, or access control.

4.65 The Commission recommends that the Minister of Justice and Constitutional Development should be mandated to develop a comprehensive standardised record management policy for the lower courts. The policy should establish clear procedures for managing paper and electronic court records. It should cover all aspects of court records management throughout their life cycle, including record creation, media types, record integrity and preservation, storage, records security and safety, backup systems, tracking and tracing, audit inspections²⁴¹ and trails, disaster recovery plans, and training of record management staff.²⁴²

4.66 The proposed record management policy should be based on the guidelines for the compilation of a records management policy contained in Annexure 4 of version 1.4 of the Records Management Policy Manual published by the National Archives and Records Service of South Africa in October 2007. The Commission is of the view that the proposed standardised policy will ensure standardisation and greater compliance with the NARSSA Act. The Commission recommends the inclusion of the following provision in the Magistrates' Courts Act, 32 of 1944:²⁴³

7B. Standardised court record management policy

(1) The Minister must, within 24 months from the date of commencement of this section and after consultation with the Chief Justice, the National Director of Public Prosecutions, and the National Archivist, issue a comprehensive standardised record management policy applicable to courts established under section 2 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

(2) The Minister must first publish the policy in the Gazette with a notice that the Minister intends to issue such a policy and invite interested persons to submit to the Minister, within such period as is specified in the notice, any objections to or representations concerning the policy.

²⁴¹ Conducting routine inspections to ensure compliance with record-keeping standards is important.

²⁴² See also Saman WSWM and Haider A "Electronic Court Records Management: A Case Study" 2012 *Journal of e-Government Studies and Best Practices* at 9.

²⁴³ Section 7 of the Magistrates' Courts Act broadly addresses public access to court records; however, it lacks a mandatory framework for the creation, maintenance, security, and preservation of such records. Furthermore, the Commission is of the view that the enabling legislative provision for a standardised court record management policy would be better placed in the Magistrates' Courts Act rather than the Criminal Procedure Act (CPA). The CPA prescribes procedures for criminal cases; however, Magistrates' Courts also adjudicate civil matters, which are governed by the Magistrates' Courts Act. Consequently, the proposed record management policy ought to be applicable to both criminal and civil court proceedings records.

- (3) The Director-General must, after publication of the policy and within the prescribed period—
- (a) consult with court record managers, court officials responsible for record management and any other relevant persons to familiarise them with the contents of the policy and obtain their views and comments on the policy;
 - (b) give due consideration to all objections, representations, and views obtained and revise the policy if necessary.
- (4) The Minister may, after the revision contemplated in subsection (3)(b), publish the revised policy in the Gazette for further public comment, in which case the provisions of subsection (3) must, with the necessary changes, apply.
- (5) The policy, as finally revised, must be issued by the Minister as contemplated in subsection (1).

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| Should the Chief Justice be mandated to issue a separate but equally comprehensive standardised record management policy specifically for the Superior Courts? |
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