

SOUTH AFRICA / JUDGMENT

Doorewaard and Another v S (CC33/2017) [2019] ZANWHC 25 (23 May 2019)

[2019] ZANWHC 25**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

CC33/2017

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Source record**IN****THE NORTH WEST HIGH COURT, MAHIKENG****CASE****NO: CC33/2017****In**

the matter between:

PIETER
DOOREWAARD
1st
Applicant
PHILLIP
SCHUTTE
2nd
Applicant
and
THE
STATE
Respondent
DATE
OF HEARING
: 03
MAY 2019
DATE
OF JUDGMENT
: 23
MAY 2019
FOR
THE APPLICANT
:
ADV. B ROUX SC

FOR
THE RESPONDENT
:
ADV. MOLEFE

JUDGMENT

ON APPLICATION FOR LEAVE TO APPEAL

HENDRICKS J

Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal (SCA) against conviction and sentence imposed on the applicants, Mr. Pieter Doorewaard (1st applicant) and Mr. Phillip Schutte (2nd applicant) on 06th March 2019. They were convicted of murder, kidnapping, intimidation, theft and pointing a fire-arm. The 1st applicant was sentenced to an effective term of eighteen (18) years imprisonment and the 2nd applicant to an effective term of twenty-three (23) years imprisonment, after it was ordered that some of the sentences should

run concurrently.

The Notice of Application for Leave to Appeal

[2] On the 20th March 2019, a Notice of Application for Leave to Appeal (notice) was filed with the Registrar of this Court on behalf of both applicants.

This notice comprises forty (40) typed pages. The grounds of appeal are not succinctly set out and the notice comprises lengthy

arguments. Heads of argument were also filed on behalf of the applicants. The heads of argument consists of thirty-six (36) typed

pages, four (4) pages less than the notice. The heads of argument is a regurgitated version of the notice and is almost verbatim similar.

[3] The law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to appeal must be clearly and succinctly set out in unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant

seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. The notice should not contain

arguments. Therefore heads of argument must also be filed and served in which the points to be argued will be set out in much more detail.

See:

- Songono v Minister of Law and Order 1996 (4) SA 384 (E).
- S v Mc Kenzie 2003 (2) SACR 616 (C).
- Xayimpi and Others v Chairman Judge White Commission and Others

[2006] 2 ALLSA 442 (E).

- S v Van Heerden 2010 (1) SACR 539 (ECP).

[4] During oral submissions, and in response to a question raised by the Court about the overelaborate notice and grounds of appeal, counsel for the applicants, Adv. Barry Roux SC, conceded that the notice is far too long. This concession was indeed well-made. Be that as it may, this Court took cognizance of all the grounds listed and argued in the notice of application for leave to appeal, the regurgitated heads of argument and oral submissions made in order to determine whether or not to grant leave to appeal to the SCA.

Grounds of Appeal

[5] The application for leave to appeal is premised on the following grounds of appeal, namely:

- (i) the acceptance of the evidence of the single witness, Mr. Pakisi, in the face of contradictions in his viva voce evidence in court as well as between such evidence and the statements he made to police officers;
- (ii) whether Mr. Pakisi witnessed the deceased been thrown-off the van or whether he assumed that it happened on the second and third occasions;
- (iii) Dr. Moorad, the forensic pathologist's, evidence about the cause of death;
- (iv) the assaults on, vomiting of and shooting at Mr. Pakisi as well as the places to which he was driven;
- (v) the failure of the Court to call Seponkane as a witness in terms of the provisions of Section 186 of the Criminal Procedure Act 51 of 1977, as amended (CPA) and the special entry to be made on the record in terms of Section 317 of the Criminal Procedure Act;
- (vii) whether the principles of common purpose were correctly applied;
- (viii) whether the versions of the applicants as accused persons were reasonably possibly true;
- (ix) whether the sentences imposed upon the applicants induces a sense of shock.

The Law

[6] Section 17 of the Superior Courts Act 10 of 2013 governs applications for leave to appeal. This section states:

“Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
- (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

The test to be applied is now higher than what it used to be. It is no longer whether another court may (might) come to a different decision than what the trial court arrived at. It is now whether another court, sitting as court of

appeal, would come to a different decision.

[7] In the Notice of Application for Leave to Appeal, it is stated:

“The application for leave to appeal is on the basis that there is a reasonable prospect of success that another court may find that the Appellants versions were reasonable possibly true and the sentences imposed are inconsistent with the facts and induce a sense of shock.”

(emphasis added)

This is not the correct approach or test to be applied. It is not may but would. That another court would find that the applicant’s (appellants’) versions were reasonably possibly true and that the sentences imposed are inconsistent with the facts and induces a sense of shock.

The Merits

[8] Insofar as the grounds listed as (i) to (iv) and (viii) supra are concerned, this Court in its judgment on the merits (main judgment) dealt quite comprehensively with the evidence tendered. It analyzed the evidence and also made credibility findings with regard thereto. To avoid prolixity, it is strictly speaking not necessary to rehash what is already stated in the main judgment and same can be regarded as being incorporated herein. Suffice to state that this Court again looked at and studied the main judgment, the record, the aforementioned grounds of appeal, the heads of argument and viva voce submissions by counsel. This Court is of the view that another court, sitting as court of appeal, would not come to a different decision than what this Court had arrived at, with regard to the above-mentioned grounds of appeal.

Failure of the Court to call Seponkane as a witness in terms of Section 186 of the Criminal Procedure Act and the special entry in terms of Section 317 of the Criminal Procedure Act

“A special entry in terms of Section 317 of the Criminal Procedure Act must be entered, as an irregularity occurred by virtue of the Court’s failure to call Seponkane as Seponkane was clearly an essential witness.”

[10] The record reveals the following. During the cross-examination of Mr. Pakisi, Adv. Du Plessis on behalf of the 1st applicant, said the following:

“I put it to you that Warrant-Officer Sepongane if need be will come to this court and testify under oath that you provided him with this information, he wrote that information down on your statement. After writing it down he read it to you, he gave you also an opportunity to read it on your own and then you signed it.

I did not, it is not true he wrote, he recorded the statement after that he then made me sign the blank page and then he said we should go to the scene.

My Lord may I beg leave just to turn my back quickly at the court I just want to take instructions?

COURT: Yes.

MR DU PLESSIS: Sorry Mr Pakisi I just want to make a correction. Warrant-Officer Sepongane will come and testify to this honourable court that after he has written down the statement he did not provide you with an opportunity to read it on your own however he read it back to you in English and in Setswana --

No Warrant-Officer Sepongane did not read back that statement to me and the way he was writing it as well you could see he is not serious wherever he was writing the handwriting was more of a signature if I really had that right to read that statement then he would have given me a copy, he even refused to give me the copy he just said I should go and then I would find my statement at court

Sir I put it to that it is more probable that Warrant –Officer Sepongane had written the statement down after receiving information from your mouth and he forgot to leave a space open on the second, third and fourth pages and that it why your signature was afterwards placed on the side. -
- Why did Warrant-Officer Sepongane not spend time with me and write the statement in my presence on this paper after that give it to me to sign?

He did write it in your presence. -- He did not write it in my presence he wrote on a different page when we were done we then parted ways.”

(emphasis added)

See: Record at page 361-362:

[11] The State closed its case and made all the remaining State witnesses that appears on the list of witnesses, available to the defence. Adv. Du Plessis then said:

“MR DU PLESSIS: No My Lord. The state witnesses were only made available to us the day before yesterday and there is approximately eight state witnesses that we need to consult with.

COURT Yes? Yes'?"

See: Record at page 560:

At the close of the case on behalf of the 1st applicant, Adv. Du Plessis stated:

"MR DU PLESSIS: As the court pleases, my Lord. I have instructions to close the case for accused 1.

Before I do so I just want to place it on record there was a further witness one that was made available by the state to the defence which accused 1 intended to call it was Warrant-Officer Sepongane.

On the date when he was made available to the defence team my instructing attorney had a brief telephonic consultation with him however the following day he informed us that he will not be willing to formally consult with counsel alternatively to testify in and also for the safety of his family and that is specifically in light of violent protest that went along with this criminal case in Coligny.

For that reason that is the case for accused 1."

See: Record at page 716.

[12] It is quite apparent from the aforementioned extracts from the record and the record itself that early during the trial, and infact still during the State's case, Mr. Seponkane was consulted by the defence (attorney and counsel). That is why it was put to Mr. Pakisi as the fifth state witness out of seven, what Seponkane would testify when called upon to do so. It was confirmed by Adv. Molefe on behalf of the State, during his oral submissions in the application for leave to appeal, that Mr. Seponkane was early on during the trial made available to the defence as a witness. The reason why Seponkane

did not want to testify was placed on record by Adv. Du Plessis. Adv. Du Plessis however never applied that Seponkane be subpoenaed as a witness. Neither did Adv. P. Smit who acted on behalf of the 2nd applicant made such a request.

[13] This Court in its main judgment stated that the failure of Seponkane to testify is a neutral factor and no adverse inference can be drawn from such failure against either the State or the defence. This Court stated:

"Warrant-Officer Seponkane was not called as a witness by the State.

Mr Du Plessis, on behalf of accused 1, placed it on record Warrant-Officer Seponkane was not willing to consult with them. This is a clear indication that the witness was made available by the State to the defence to consult.

Steps could have been taken by the defence to secure the presence of this witness at court if he was unwilling to cooperate. An application could have been made to court to have this witness subpoenaed. This was not done. The fact that he was not called as a witness by either the State or the defence is a neutral factor. No adverse inference can be drawn against either the State or the defence under these circumstances.”

[14] Section 186 of the Criminal Procedure Act 51 of 1977, as amended provides:

“186. Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.”

In Hiemstra’s Criminal Procedure on page 23-16 [Issue 9], the learned author states:

“Section 186 is clearly divided into two parts, the first discretionary and the second mandatory. Although the discretion in the first part is wide, it has to be exercised judicially and in a limited manner.”

“The second part of section 186 places a duty on the court to call the witness once the court deems the evidence essential to the just adjudication of the case. It is the judicial officer’s responsibility to assess whether the evidence is essential. This assessment is the only consideration. Only if the court deems the evidence essential does the obligation to call the witness arise”

[15] Section 317 of the Criminal Procedure Act provides:

“317. Special entry of irregularity or illegality

- (1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

[Subs. (1) substituted by s. 6 of Act 42/2003]

- (2)

- (2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he is not available, or, if in the case of a conviction before a circuit court the said court is not sitting,

to any other judge of the provincial or local division of which that judge was a member when he so presided.

- (3)

[Subs.

- (3) deleted by s. 13 of Act 62/2000]

- (4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry.

- (5) If an application for condonation or for a special entry is refused, the accused may within a period of twenty-one days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice, apply to the

Appellate Division for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (7), (8), (9) and (10) of section 316 shall mutatis mutandis apply.

[Subs. (5) amended by

s. 22 of Act 105/82]

[16] In Hiemstra's Criminal Procedure on page 31-31 [Issue 9], the learned author states:

"In terms of section 317(1) the special entry "shall . . . be made" unless the court is of the view that it "is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of court" (Nel v S

[1997] 3 All SA 364 (SEC); Halgryn v S [2002] 4 All SA 157 (SCA) par

- [3] at 159e-g). The wording "frivolous or absurd" is discussed in S v Cooper 19 77 (3) SA 475 (T). "Frivolous" means characterised by a lack of seriousness, as would be a point, which is obviously insufficient. "Absurd" applies to an application which is inconsistent with reason or common sense and thus unworthy of serious consideration: the application must be so unfounded that no reasonable person can possibly expect it to succeed. The court must not easily conclude that the application is without merit; the above-mentioned characteristics must therefore appear as certainties, not as probabilities.

On the other hand, the proviso in section 322 (1) requires that the impact of the irregularity must be such "that a failure of justice has in fact resulted". If the two provisions are considered in context, it is clear that the first step (the process in terms of section 317(1)) actually only introduces the alleged irregularity, unless the irregularity is a contrivance or has no merit. The

trial court does not decide on the merits or results of the irregularity. That is the function of the Appeal Court, which first determines whether an irregularity within the meaning of section 317 has been established and, if such irregularity is so established, applies the measure of the proviso to section 322(1).”

[17] On behalf of the applicants, it was contended that Seponkane was an essential witness because:

“36. ...

36.1 he refused at first to take his statement;

36.2 he called him a drunk and a mad person;

36.3 he took his first statement incorrectly;

36.4 he caused him to sign blank pages when he took his first statement;

36.5 when Pakisi showed him blood at the scene where the deceased had allegedly been thrown off in the sunflower fields, Seponkane forgot to call forensics to examine the scene.

37. Seponkane was an essential witness to confirm or refute the above allegations. If Seponkane refuted the allegations Pakisi would have been exposed as a liar. The defence consulted with Seponkane during the trial and it was then put on behalf of the Accused that Seponkane's evidence was that he correctly took the statement and that he in fact read the statement back to Pakisi in English and Setswana (Record, page 361). This evidence, if Seponkane was called would have been crucial as it would have refuted the evidence of Pakisi in material respects.

38. Furthermore, when Brigadier Kgorane relied on the first statement of Pakisi for the purposes of the pointing out by Pakisi, counsel, on behalf of the Accused was not permitted to make use of the statement (Record, page 204) as Seponkane was not a witness. If he was called, he could have confirmed pointing outs in terms of his first statement or Pakisi's pointing outs could have been contradicted because of what was in his first statement.”

[18] Seponkane was consulted by the defence in relation to the taking down of the first statement by Mr. Pakisi, after he was made available to the defence by the State. He therefore became a defence witness. It was incumbent upon Adv. Du Plessis on behalf of the 1st applicant or Adv. P Smit on behalf of the 2nd applicant or their instructing attorney (because both the applicants were represented by one attorney) to cause Seponkane to be subpoenaed as a witness either by the Registrar of this Court or by this Court.

[19] The contention is that Seponkane would either confirm or refute the allegations by Mr. Pakisi. The defence did consult with Seponkane early enough during the State's case and it could have been put to Mr. Pakisi, if indeed Seponkane refuted the testimony of Mr. Pakisi in material respects. Once again, this was not done. It can hardly now be contended that the Court should have called Seponkane because he was an essential witness.

[20] The fact that Brigdier Kgorane relied on the first statement of Mr. Pakisi for the purposes of pointing out by Mr. Pakisi is neither here nor there. This statement was contested by Mr. Pakisi on the basis that what was contained in it was not read by Mr. Pakisi nor was it read back to him and explained. This had any and everything to do with credibility. It was not necessary that a trial-within-a-trial be conducted to determine the admissibility of this statement. It was incumbent upon the defence to call Seponkane if indeed it was essential to call him.

[21] Counsel for the applicants referred to the cases of:

- Gabaatholwe and Another v S [2003] 1 All SA 1 (SCA);
 - Director of Public Prosecutions Transvaal v Mtshweni [2007] 1 All SA 531 (SCA) and
 - S v Gerbers 1997
- (2) SACR 601 (SCA).

This was done in support of the application. In my view, these cases are clearly distinguishable from the present case.

[22] In Gabaatholwe the applicants were convicted and sentenced. An application for leave to appeal was refused by the trial court and thereafter also the petition to the Supreme Court of Appeal (SCA). However, at the request of counsel, the trial judge made a special entry in terms of Section 317 of the Criminal Procedure Act 51 of 1977 (CPA). The record does not bear out the statement that counsel informed the Court that the witness was hostile to the defence. What counsel did say was that the defence did not enjoy an opportunity to consult with the witness and was unaware of whether he would co-operate or consult with the defence. Counsel then sought the assistance of the court relying on Section 186 of the Criminal Procedure Act. The trial judge refused the application to subpoena the witness stating that he was unpersuaded that the witness was essential at the stage of the proceedings. The SCA found that it was unpersuaded that the trial judge was wrong in refusing the application to subpoena the witness.

It was held:

“[6] In section 186 “essential to the just decision of the case” means that the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.

- [7] The parties will often possess insights into the contribution which a witness could make not apparent to the judge or magistrate and their views should always be canvassed before the decision is taken (as the judge did in this case). The best indication to the trial court of the importance that a party attaches to calling a witness is the assiduity which that party applies to ensuring that the witness is available to it. In this case the defence made no attempt to subpoena the witness. The explanation that he was hostile was both unconvincing and insufficient. The Court was not asked to exercise its powers although it had made perfectly plain that its earlier ruling was limited to the stage at which it was made. Nor was any indication given that defence counsel regarded his earlier submissions about the essentiality of the witness as being of continued validity.”
- [23] In Mtshweni the matter served before the Supreme Court of Appeal as a result of a question of law been reserved in terms of Section 319 of the Criminal Procedure Act 51 of 1977. The trial judge believed that the evidence of the ballistic expert was essential but failed to call the witness. The Supreme Court of Appeal found that the trial judge had a duty to call the witness in view of the court’s belief that it was essential to the just decision of the case. The acquittal of the accused turned on the absence of this evidence. The assessment of whether evidence is essential is indeed left to the presiding judge. It is his or her view that must be taken into account in determining whether the court is under an obligation to call a witness. The trial court in that case, given its firm view on the importance of the ballistic report, was therefore under a legal duty to call the ballistics expert. Its failure to do so amounted to an error of law.
- [24] In Gerbers it was stated that at page 606 G – 607 A:

“It does not follow of course, from the mere existence of these discretionary powers, that it can never be said that a trial Judge

who exercises them has done so 'irregularly' as that word is understood in the jurisprudence of criminal procedure. The many cases

in which a Court of Appeal has set aside a conviction on the ground of irregular questioning by a judicial officer bear testimony to that. Nor does it follow from the mere existence of a positive duty to exercise those powers in circumstances where it appears essential to the just decision of the case, that a trial Judge's conclusion that the circumstances were indeed such, is unassailable in a higher Court and that, no matter what the circumstances may have been, his carrying out of what he perceived to be his duty can never constitute an irregularity. On the other hand, it is necessary to remind oneself that there are well-known limits to the power of a Court of Appeal to gainsay the bona fide exercise by a trial court of a judicial discretion vested in it. As for the conclusion of a trial court that it is duty-bound to exercise the powers under consideration, there too I think that a Court of Appeal should not lightly substitute its own opinion, reached with the benefit of hindsight, for that of the trial court which had to reach its conclusion that the exercise of the particular power was essential to the just decision of the case upon the evidence which had thus far been placed before it and without the benefit of knowing that, in the result the evidence

given by persons whom it decided to call would be.”

[25] In *S v Botha* 2006 (1) SASV 105 HHA, the following is stated by the SCA:

“[3] In sy uitspraak in die art 317 aansoek het die Verhoorregter die volgende gesê:

'Myns insiens is 'n onreëlmatigheid gepleeg deur die regsverteenwoordiger van die applikant deurdat hy nie die saak van die applikant na behore kon voer nie as gevolg van die botsing van belange wat bestaan het tussen die onderskeie beskuldigdes wat hy verteenwoordig het.'

Daarna beskryf hy sy taak as volg:

'As Verhoorhof is dit my taak om slegs die onreëlmatigheid aan die orde te stel, en nie om die meriete of die gevolge van die onreëlmatigheid

te besleg nie.'

Hierin het die geleerde Regter fouteer. Dit is nie sy taak om 'n bevinding te maak of die gewraakte gebeure neerkom op 'n onreëlmatigheid nie. Dit is die taak van hierdie Hof. Sien *S v Kroon* 1997

(1) SASV 525 (HHA) op 530b waar die volgende beskrywing van 'n Verhoorhof se plig in *Kriegler Hiemstra Suid-Afrikaanse Strafproses* 5de uitg op 852 (6de uitg op 890) goedgekeur is:

'Die hof wat die aantekening maak, moet die feite waarop dit berus vasstel, en nie die aantekening bewoord asof die Appèlafdeling die feite moet bepaal nie. Daar word 'n positiewe feitestelling gemaak vergesels van die bewering van die beskuldigde dat dit 'n onreëlmatigheid was wat meegebring het dat geregtigheid inderdaad nie geskied het nie.'

(My kursivering.) Die Verhoorhof besleg nie die meriete of gevolge daarvan nie. Dit is die funksie van die Appèlhof, wat ten eerste bepaal of daar 'n onreëlmatigheid was (loc cit 851 (6de uitg op 889)).

[4] Die eerste stap in die appèl is dan om te bepaal of daar wel 'n onreëlmatigheid gedurende die verrigtinge plaasgevind het. Indien wel, dan is die tweede stap om ingevolge die voorbehoudsbepaling tot art 322 van die Wet te bepaal of geregtigheid geskied het niesteenstaande so- danige onreëlmatigheid. (*S v Xaba* 1983 (3) SA 717 (A) te 735H - 736A.)

Die toets om te bepaal of 'n onreëlmatigheid plaasgevind het is al meermale deur hierdie Hof neergelê. (Sien *S v Rudman and Another*; *S v Mthwana* 1992

(1) SASV 70 (A) (1992

(1) SA 343) te 337B; *S v Felthun* 1999

(1) SASV 481 (HHA).) In laasgenoemde saak te 485h sê Vivier AR:

'Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted. The basic concept underlying s 317(1) is that an accused must be fairly tried (per Botha JA in *S v Xaba* 1983 (3) SA 717 (A) at 728D).'

Dit is ook in ooreenstemming met art 35 van die Grondwet van die Republiek van Suid-Afrika, 1996."

[26] In the *Sithole v S* (A149/10) [2013] ZAGPPHC 480 (3 December 2013), a Full Bench decision of the Gauteng Provincial Division, Pretoria, the accused was convicted of murder and attempted murder. He was sentenced to 16 years and 4 years imprisonment on the respective counts. The sentences were ordered to run concurrently, rendering the sentence to be effectively 16 years imprisonment. Leave was granted to appeal against both the conviction and sentence. When the matter served before the Full Court, the question arose as to whether or not an irregularity had occurred during the trial with regard to the failure by the trial Court to call a witness in terms of Section 186 of the Criminal Procedure Act. The Full Court postponed the appeal sine die and granted the appellant leave to apply to the trial court for a special entry in terms of the provisions of Section 317 about the failure of the trial court to call the witness. The application for a special entry was duly made and considered by the

trial judge and the application for a special entry was dismissed. The appeal was re-enrolled before the Full Court. What was then

before the Full Court was whether the failure by the trial Court to call a witness in terms of Section 186 of the Criminal Procedure Act constitutes an irregularity justifying the setting aside of the conviction and sentence. This, notwithstanding the dismissal of the special entry by the trial court.

[27] With regard to the failure to call the witness it was stated by the Full Court that the name of Mr. Khaba (the complainant on count 2), appeared on the list of State witnesses. The State did not call him but made him available to the defence, who likewise declined to call him. Neither the State nor the defence requested the Court to call Mr Khaba in terms of Section 186 of the Criminal Procedure Act. The question is whether the trial court's failure to call Mr. Khaba constituted an irregularity resulting in an injustice. The Full Court found that it did not for the following reasons:

"i. The Court carefully considered the potential value of the witness and in particular the election by both the State and the defence (both of whom consulted with the witness and had seen his written statement). The conclusion that he would support neither the State's nor the defence's case was properly founded, under the circumstances. Accordingly on that basis, he could hardly have been of assistance in the sense of an essential witness to the Court.

ii. In the circumstances and on account of the above, it could hardly be said that his evidence would probably have affected the result that the Court ultimately arrived at.

iii. The discretion that was exercised not to call him in my view was founded on the correct principle and is unassailable.

There is accordingly no basis to conclude that the failure by the trial court to call the witness in accordance with the provisions of Section 186 of the Act constituted an irregularity.”

[28] In *Nkabinde v The State* (115/17) [2016] ZASCA 75 (01 June 2017) the following is stated by the SCA with regard to Section 317:

“[27] The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under s 318(l) of the Act. The latter section provides, inter alia, that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the basis of the irregularity stated in the special entry. Recently this Court has held that the sole purpose of a special entry is to record an irregularity that does not appear on the record. As is shown below, all of the so-called special entries are not proper special entries but grounds of appeal under s 316 of the Act, because they appear on the record. Some 60 years ago this Court held that the special entry procedure is of vital importance and should be utilised where the irregularity does not appear on the record of the proceedings. So, the statement in the application for leave to appeal to this Court that a special entry is 'simply a method of applying for an appeal in regard to irregularities on or off the record' is quite wrong.

[28] The proviso to s 322(1) of the Act makes it clear that a conviction or sentence must not be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the appellate court that a failure of justice has in fact resulted from such irregularity or defect. In *Naidoo JA* identified two broad categories of irregularities: those of a serious and gross nature that per se vitiate a trial; and those of a less serious nature, where the court can separate the good from the bad and is able to consider the merits of the matter.

[32] It must be stressed that an application for a special entry is not there for the asking the requirements of s 317(1) of the Act must be met, and the court must satisfy itself that the application is bona fide and that it is not frivolous, absurd or an abuse of the process. The court a quo failed to do so. All the so-called special entries should not have been made. In some instances they are simply not bona fide. In others, they are frivolous and consist of points that lack any substance and cannot be seriously taken; or they are absurd in that they are inconsistent with reason or common sense and unworthy of serious consideration.”

[29] A special entry in terms of the provisions of Section 317 must be made, so it was submitted in terms of the Notice of Application for Leave to Appeal. No application for a special entry was made during the trial. Although the notice of application for leave to appeal was filed within fourteen (14) days after the trial was concluded, no substantive application was made in terms of section 317 for a special entry. Even at the date of hearing of the application for leave to appeal there was no such substantive application made. Apart from mention been made in the Notice of Application for Leave to Appeal about a special entry, there was no such application made.

- [30] Apart from the fact that no substantive application has been made, if this Court were called upon to determine whether Seponkane was an essential witness for this Court in order to arrive at a just decision, it would conclude that he was not. As previously demonstrated, this case is clearly distinguishable from the cases of Gaboatholwe, Mtshweni, Gerbers and Sithole, *supra*. Clearly, based on the evidence presented, Seponkane was not an essential witness for a just determination of this case. No irregularity was committed by this Court not calling Seponkane as a witness and no other Court, as court of appeal, would come to a different decision in this regard.
- [31] Adv. Barry Roux SC on behalf of the applicants contended that leave to appeal to the SCA should be granted in order for the SCA to determine whether or not Section 317 and Section 186 operate independently or whether the one could be invoked via the other. This aspect has been decisively decided by a Full Court in the Sithole matter, *supra*.

Common Purpose

- [32] This Court in its main judgment concluded that the applicants acted in concert with one another in furtherance of a common goal. Neither of them dissociated himself from the conduct of the other. The action of one is therefore imputed on the other. In the main judgment, reference is made to *S v Mgedezi* 1989 (1) SA 687 (A) and *S v Thebus*
- [2003] ZACC 12; 2003 (2) SACR 319 (CC). The principles laid down in the Mgedezi case withstand constitutional muster, as was found in the Thebus case by the Constitutional Court.
- [33] In *S v Musingadi and Others* 2004 (4) SA 274 (SCA), to which reference was also made in the main judgment on the merits of this matter, the following is stated by the SCA:

"[35] This court has twice expressly left open the correctness of this dictum and whether it is rule of law or a rule of thumb. See Nduli's case, supra, at 5076; Lungile's case, supra, at 603 para [20]. What may be gathered from our case law, however, is that not every act of apparent disengagement will constitute an effective disassociation."

Compare Snyman: *Strafreg* (4ed) at 267-9. It appears that much will depend on the circumstances: on the manner and degree of an accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of circumstances is not exhaustive. To reduce this composite of variables to a workable rule of law may be artificial, even unwise. In an article entitled 'Accomplices and Withdrawal' (1981) 97 LQR 575 Professor David Lanham reviewed the case law in the Commonwealth and USA. He concluded at 591:

'While it is not possible to produce a detailed definition of withdrawal as a defence to accomplice liability, a number of principles can be extracted from the weight of authorities examined above. These principles are as follows:

1. Any withdrawal, voluntary or otherwise, which negates the actus reus of accomplice liability exculpates the accused.
2. A withdrawal which does not negate the actus reus of accomplice liability may nonetheless be defence if certain conditions are satisfied –
 - (a) Such a withdrawal must be a voluntary withdrawal.
 - (b) Whatever form the participation takes, reasonable steps to prevent the crime may exculpate the accused even if there is no countermand.
 - (c) Where the act of participation goes beyond encouragement, mere countermand may not be sufficient to exculpate the accused.
 - (d) Where the participation takes the form of encouragement (eg counsel, command or agreement) a potentially effective countermand will afford a defence even if no other steps are taken to prevent the crime. Such countermand may be expressed in words or implied by conduct.
 - (e) Withdrawal must be capable of being effective: a withdrawal which is untimely, uncommunicated, or misunderstood or a countermand which is not received by all principals will be no defence.'

See too SA Criminal Law and Procedure Vol 1 (3ed, Burchell) at 318-320.

[34] It was contended that the 1st applicant, who was the driver of the van, was not at the back of the van when the throwing –off of the deceased happened suddenly and without prior warning. Furthermore, that his actions after the event of the throwing-off of the deceased cannot revive or establish an intention at the time of the event even if he failed to dissociate himself.

[35] This contention lose sight of the fact that it was the evidence of Mr. Pakisi that the 1st applicant was with the deceased at the van in the road leading to the informal settlement called Scotland, when the 2nd applicant arrived at the van and climb onto it. The van was driven forward and the deceased was then thrown-off by the 2nd applicant. The van stopped. The deceased was picked up and loaded onto the van. The van drove forward and stopped again. This process

was repeated.

[36] The fact that the van was stopped and then drove off again on two further instances lead Pakisi to assume that the process was repeated. This must have happened with the knowledge of the 1st applicant. The 1st applicant needed not be at the back of the van when the throwing-off of the deceased happened in order to be guilty of murder based on the principle of common purpose. The only reasonable inference that can be drawn from the proven facts leaving aside speculation and conjecture, is that the 1st applicant must have been aware what the second applicant was doing and associated himself with the conduct of

the 2nd applicant.

Motive

[37] In the Notice of Application for Leave to Appeal, the following is stated with regard to motive:

“44. There is no acceptable evidence that Accused No. 1 or 2 had any motive to throw the deceased from the back of the van. They were on their way to the police station, as they have done before.

45. If they had a motive to kill the deceased it remains inexplicable why they asked for an ambulance to be contacted and people to remain with the deceased, as the deceased was still alive and if saved who would have lived to incriminate them.”

This aspect was dealt with extensively in the main judgment on the merits.

[38] It need to be reiterated that this contention lose sight of the fact that on their own version the applicants alleged that the child (deceased), who according to both of them was seriously injured to such an extent that they did not even wanted to touch him and deemed it necessary to summon an ambulance through the assistance of the police, was left in the care of total strangers, alongside the main gravel road leading to Coligny. They went to the police station instead of the clinic. The clinic is situated a mere 900 meters from the police station and was open because it was on a Thursday. They left their cellular phone numbers with the police officer at the police station and then left.

[39] Thereafter, they did not return to the scene where the critically injured deceased was lying in the road. Instead, they went to their workshop and continued with their daily chores, after they even refused to take the police officer to whom they made the report, to the scene. Their conduct indicate that they were least concerned about the condition of the deceased. This Court concluded that the applicants wanted to create the impression that the deceased jumped from the van and got injured but was least concerned what might ultimately happen to him. This, coupled with their previous experiences of theft allegedly committed on the farm which they reported to the police without any positive results of successful prosecutions, leads to the conclusion that they had a motive to punish the deceased, which ultimately resulted in his death. It is not inexplicable why they would asked for an ambulance to be contacted and people to remain with the deceased. This was clearly a cover-up. Their actions, after leaving the police station and going on with their daily tasks as well as their refusal to take the police officer to the scene, speaks volumes.

Sentence

[40] The following is stated as ground of appeal on sentence:

“SENTENCES

54. The sentences induce a sense of shock as:

54.1 Accused I was the driver of the Vehicle when (on the State's version) the deceased was thrown off suddenly and unexpectedly;

54.2 on the Court's finding both acted with dolus eventualis and the sentences do not reflect dolus eventualis.

WHEREFORE the Court is respectfully requested to grant leave to the Appellants to appeal against the convictions and the sentences imposed to the Supreme Court of Appeal."

[41] Not much was said by counsel on behalf of the applicants insofar as it relate to sentence. Adv. Molefe on behalf of the State submitted that the fact that not much was said about sentence, clearly indicate that there is no valid ground for interference with the sentence imposed upon the applicants. Apart from stating that the sentences induce a sense of shock, there is no misdirection pointed out with regard to the sentences imposed upon both applicants.

[42] It is noteworthy that reference is only made to the 1st applicant who was the driver of the vehicle and that the throwing –off happened suddenly and unexpectedly and that the conviction

based on dolus eventualis is not reflected in the sentence. Nothing is said about the 2nd applicant except that the sentence based on dolus eventualis does not reflect same. This is a clear indication that the sentences are not seriously attacked. By implication it amounts to a concession that the sentences are just, fit and proper.

Conclusion

[43] I am of the view that there are no reasonable prospects of success on appeal in that another court, as court of appeal, would arrived at a different conclusion based on the facts, than what this Court had arrived at. The application for leave to appeal to the SCA against both conviction and sentence with regard to both the 1st and 2nd applicants, should therefore fail. No special entry in terms of the provisions of Section 317 of the CPA should be made, as there was no such application made. Even if it was made, no case for such special entry has been made out by the applicants. I am of the view that had such a special entry been applied for, it would have been frivolous and amount to an abuse of the processes of Court.

Order

[44] Resultantly, the following order is made:

Leave to appeal to the Supreme Court of Appeal (SCA) against both conviction and sentence in respect of both the 1st applicant (appellant) Mr. Pieter Doorewaard and the 2nd applicant (appellant) Mr. Phillip Schutte is refused.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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