

SOUTH AFRICA / JUDGMENT

Femel v S (CA37/2017) [2024] ZANWHC 273 (5 November 2024)

[2024] ZANWHC 273

COURT

North West High Court, Mafikeng

BEFORE

S Mfenyana, FMM Reid

CASE / FILE NUMBER

CA37/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO: CA37/2017

Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates:

YES/NO

Circulate to Regional

Magistrates: YES/NO

In

the matter between:

JOSEPH

DODO

FEMEL

APPELLANT

AND

THE

STATE

RESPONDENT

CORAM:

REID J et MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 05 November 2024 at 10h00.

ORDER
(1)
The application for condonation for the late filing of the appeal is dismissed.

JUDGMENT

MFENYANA J

Introduction

- [1] The appellant appeared in the Regional Court, Atamelang on a charges of rape (in terms of section 3 of the Criminal Law Sexual Offences and Related Offence Act 32 of 2007 read with the provisions of section 51(1) of schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA) (Count 1); robbery with aggravating circumstances as envisaged in section 1 of the Criminal Procedure Act 51 of 1977 (CPA) read with the provisions of section 51(2) of the CLAA (Count
- 2) and assault with intent to do grievous bodily harm (Count 3). On 29 June 2017 he was convicted on all charges and sentenced to 20 years imprisonment in respect of Count 1, 10 years imprisonment for count 2 and 1 year for count 3. The sentences were ordered to run concurrently.

Condonation

- [2] The appellant appeals against his conviction and sentence. He also seeks condonation for the late filing of the notice of appeal. The condonation application is opposed by the respondent on the basis that the appeal enjoys no prospect of success.
- [3] It is clear from the appellant's affidavit in support of the condonation application that the delay was occasioned by a number of aspects, most of which were not within the appellant's capacity. These include the staff turnover at the offices of the Legal Aid leading to the unavailability of the appellant's attorney, and delays in obtaining the transcribed record. In this regard the appellant avers that he immediately instructed his attorney to proceed with an appeal against his sentence and applied for leave to appeal which was granted by the trial court. He intended to retain the services of a private legal representative but could not sustain this due to lack of funds as he was in custody. The appellant contends that he thereafter secured the services of Mr Gongeka from Legal Aid who advised him that he needed to obtain the record. When he later enquired, he was advised that Mr Gongeka was no longer in the employ of Legal Aid.

- [4] Save to state that on 26 August 2019 he ultimately wrote a letter to the offices of the Legal Aid, the appellant sheds no light on when he approached Mr Gongeka. What is evident is that it was a little over 2 years when he wrote to the offices of the Legal Aid enquiring about the progress of his matter. He is however silent on the prospects of success of the appeal. No explanation is offered by the appellant for the delay in attending to those aspects of his appeal

that were within his capacity, including making a follow up timeously.

- [5] It is also worth mentioning that this appeal was previously set down for hearing on three previous occasions. In all instances, it could not proceed owing to some or other non-compliance with the Rules of Court and the practice directives of this Division by the appellant. On the last occasion, the appeal, a Full Bench of this Division found that the appeal had lapsed, and in the absence of an application for reinstatement, removed from the roll.
- [6] It is trite that when deciding whether or not condonation should be granted, a court will consider various factors, including the explanation for the delay, the length of the delay, the importance of the issue and the prospects of success. It is no wonder that in opposing the application for condonation, the respondent relied on the decision of the Appellate Division in *Melane v Santam Bank Insurance Co. Ltd*[1] where the court stated that:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon the consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily those facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion,

save of course that if there are no prospects of success there would be no point in granting condonation.”

- [7] In *Grootbom v National Prosecuting Authority*[2] the Constitutional Court noted that condonation cannot be had for the mere asking. A party seeking condonation must make out a case for it and show sufficient cause. It requires a party to give a full explanation for its non-compliance.[3]
- [8] The explanation proffered by the appellant is not adequate. He has not provided a full explanation as required by law. He glibly states that he was assisted by Mr Gongeka whom he was advised no longer works for the Legal Aid. He does not say when this was. He also does not say how long he waited for Mr Gongeka. In so doing, he failed to

make out a case for the relief he seeks. No good cause has been shown for the exercise of this court’s discretion. That being the case, there exists no ground for the granting of condonation. The application for condonation falls to be dismissed.

Order

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

(1) The application for condonation for the late filing of the appeal is dismissed.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree.

FMM REID

APPEARANCES

For the appellant: O Madiba Instructed by: Legal Aid South Africa Mmabatho For the respondent:

J Maseko Instructed by: Director of Public Prosecutions Mmabatho Date reserved: 19 April 2024

Date of judgment: 05 November 2024

[1] 1962

(4) SA 531 (A).

[2] 2014

(2) SA 68 (CC); Also. Uitenhage Local Council v South African Revenue Service 2004

(1) SA 292 (SCA).

[2] 2014

(2) SA 68 (CC); Also. Uitenhage Local Council v South African Revenue Service 2004

(1) SA 292 (SCA).

[3] Ibid, para 23.

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Prepared on 10 October 2026 · Esheria