

SOUTH AFRICA / JUDGMENT

Maleshane v S (Appeal) (CA25/2024)

[2024] ZANWHC 296 (6 December 2024)

[2024] ZANWHC 296**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, M Wessels

CASE / FILE NUMBER

CA25/2024

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Source record**IN THE NORTH WEST HIGH****COURT, MAHIKENG****CASE NO: CA25/2024****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional
Magistrates: NO**In the matter between:**

KHUMO

MALESHANE

Appellant

AND

THE

STATE

Respondent

DATE

OF HEARING

: 22

NOVEMBER 2024

DATE

OF JUDGMENT

: 06

DECEMBER 2024

FOR THE

APPELLANT

: MR.

MOTJOPE

FOR THE

RESPONDENT

: MR.
TLATSANA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10H00 on 06 December 2024.

ORDER

Resultantly, the following order is made:

- (i) The appeal is struck from the roll.

HENDRICKS JP

Introduction

[1] This is an appeal against conviction and sentence. Mr. Khumo Maleshane ('appellant') stood trial as accused 2, together with his co-accused Mr. Itumeleng Satan Nthare who was accused 1, and Mr. Absolom Khutledi as accused 3, on a charge of attempted murder. It was alleged that they unlawfully and intentionally, with a common purpose, attempted to kill Nwosanu Abram Philly, by shooting and stabbing him on 28 February 2021. They pleaded not guilty to the charge on 21 April

2022. The trial continued. On 03 October 2023 accused 3 passed away. The appellant and accused 1 were convicted on 15 June 2023. The appellant was sentenced to eight (8) years imprisonment, whilst accused 1 was sentenced to six (6) years imprisonment.

[2] On 22 November 2024 a 'Notice of Appeal' was filed with the Office of the Registrar, after it was served on the State (respondent) the previous day. The Notice of Appeal reads thus:

"BE ADVISED THAT the Appellant notes an appeal on the 25th of November 2024 at 10H00 or so soon thereafter as the Appellant's representative may be heard at the High Court, Mahikeng at Unit 4, University Drive, Mmabatho.

TAKE FURTHER NOTE THAT an appeal is against the conviction and sentence by the learned Regional Court Magistrate, Mrs. Van de Walt, held on the 29th June 2023 at Stilfontein Regional Court.

TAKE NOTICE FURTHER THAT, the Appellant prays for the conviction to be set aside pending the finalization of the appeal.

Dated at MAHIKENG on this 22nd day of November 2024."

[3] Rule 67 (5A) (a) and (b) of the Rules Regulating The Conduct Of The Proceedings of the Magistrates' Courts of South Africa (Magistrates' Court Rules) of 01 December 2020 states:

“(5A) (a) A person contemplated in the first proviso of section 309 (1) (a) of the Criminal Procedure Act, 1977, who wishes to appeal against his or her conviction or sentence or order, shall do so in writing to the registrar or clerk of the court and shall also send a copy of such notice of appeal to the Director of Public Prosecutions concerned or in a case in which the prosecution was not at the public instance, to the prosecutor concerned.

(b) The notice of appeal contemplated in paragraph (a) shall set forth clearly and specifically the grounds upon which such person wishes to appeal.”

[4] The notice of appeal does not set out the grounds of appeal. The law governing a notice of appeal is trite. The grounds of appeal in a notice of 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 appellant seeks to make out, and which the respondent is to meet in opposing the appeal.

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).

[5] I find it apt to quote extensively from the matter of Edwin Omphemetse Michael v The State, case number CA38/2022, in which this Court stated the following:

“[10] It would be remiss of this Court not to address the inadequate grounds of appeal set out in the Notice of Appeal. The jurisprudence which has developed in our law is trite in this regard. It applies both to applications for leave to appeal and the appeal itself. In the context of the present appeal, section 309B of the Criminal Procedure Act 51 of 1977 (‘CPA’) provides the first basis which would, if leave to appeal is granted by the lower court, more often than not determine the grounds of appeal to be considered by the appeal court. Section 309B(3)(a) of the CPA therefore specifically provides that:

“309B(3)(a): Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.”

[11] The rationale behind section 309B(3)(a) of the CPA is that the grounds of appeal must be such that it enables both the court and the respondent to know without unambiguity what case the applicant seeks to make out, which the respondent has to meet in opposing the application for leave to appeal. The dictum by Leach J in Songono v Minister of Law and

Order 1996 (4) SA 384 (E) at 385E to 386A, was approved by a Full Court of the High Court, Eastern Cape in *Xayimpi and Others v Chairman Judge White Commission (formerly known as Browde Commission) and Others* [2006] JOL 16596 (E). In *Songono*, Leach J stated as follows:

*“I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1) (b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify ‘the grounds upon which the appeal is founded’. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49(3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, *Harvey v Brown* 1964*

(3) SA 381 (E) at 383; *Kilian v Geregsbode, Uitenhage* 1980

(1) SA 808 (A) at 815 and *Erasmus Superior Court Practice* B1-356-357 and the various authorities there cited.

It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and 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. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory. In my view the lengthy and rambling notice of appeal filed in *casu* falls woefully short of what was required. Mr Bursey suggested that grounds of appeal could be gleaned from the notice but that is not the point - the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant

intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed.”

[12] It is unsurprising, given the inadequate grounds of appeal, that the heads of argument drafted by counsel for the appellant suffers the same fate in that it is of no assistance to this Court. The effect of the terse grounds of appeal and heads of argument is that neither this Court nor the respondent is informed of the case the appellant seeks to make out on appeal. It is peremptory that the grounds of appeal are set out clearly and succinctly in unambiguous terms. Paucity and prolix in grounds of appeal must be avoided. In *Doorewaard and Another v S* (CC33/2017) [2019] ZANWHC 25 (23 May 2019), prolixity in grounds of appeal was deprecated where Hendricks J (as he then was) said:

“[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.

(emphasis added)

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).”

Conclusion

[13] Ordinarily, the paucity in the grounds of appeal should result in the dismissal of the appeal. However, given the fact that we are dealing here with a matter which impacts the liberty of the appellant, the interests of justice dictate that the appeal should be struck from the roll, with directives given for the filing of a proper Notice of Appeal, which accords with the grounds on which leave to appeal was sought and granted on conviction in the Regional Court.”

[6] The fact that the notice of appeal does not comply with the rules is indeed fatal. Non-compliance with the rules has the effect that there is no appeal before this Court. For this reason, the appeal must be struck from the roll.

Order

[7] Resultantly, the following order is made:

- (i) The appeal is struck from the roll.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

M WESSELS

ACTING JUDGE OF THE HIGH COURT,

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Prepared on 13 October 2026 · Esheria