

SOUTH AFRICA / JUDGMENT

Mathuthu and Others v S (393/2021) [2024] ZASCA 50 (17 April 2024)

[2024] ZASCA 50

COURT

Supreme Court of Appeal

BEFORE

Mokgohloa, Nicholls, Mothle, Hughes, Baartman

CASE / FILE NUMBER

393/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 393/2021

In the matter between:

CLIFFORD MATHUTHU FIRST

APPELLANT

MBIZO KHUMALO

SECOND APPELLANT

CHRISTOPHER SIBANDA

THIRD APPELLANT

BHEKIMPILO NDLOVU

FOURTH APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Mathuthu and Others v The State (393/2021) [2024] ZASCA 50 (17 April 2024)

Coram: MOKGOHLOA, NICHOLLS, MOTHLE and HUGHES JJA and

BAARTMAN AJA

Heard: 29 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 17 April 2024 at 11h00.

Summary: Criminal procedure – appeal against conviction and sentence – leave to appeal refused by regional magistrate – petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 refused by the high court – special leave to appeal against the dismissal of the petition granted by this Court – test is whether appellants have shown reasonable prospects of success on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoatlheng and Janse Van Rensburg JJ sitting as court of appeal):

1 Leave to appeal of the refusal of the petition in respect of the conviction is dismissed.

2 Leave to appeal of the refusal of the petition in respect of sentence is granted.

3 The matter is remitted to the high court in respect of sentence.

Hughes JA (Mokgohloa, Nicholls and Mothle JJA and Baartman AJA concurring):

[1] This is an appeal against a refusal of a petition for leave to appeal by the Gauteng Division of the High Court, Johannesburg (the high court) (per Mokgoatlheng and Janse Van Rensburg JJ). The appellants appeared before the Newlands Regional Court, Johannesburg (the regional court) on a number of counts, to wit eleven in total. They were convicted and sentenced. I will return to the sentences imposed upon each appellant later in the

judgment.

[2] The appellants, aggrieved by the convictions and sentences imposed, sought leave to appeal, which the regional court refused. An application to the high court for leave to appeal by way of petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) was refused. This Court subsequently granted special leave to

appeal to this Court, the refusal of the petition seeking leave to appeal in respect of both the conviction and sentence.

[3] Counsel for the appellants laboured under the impression that he was at this Court to argue the merits of the appeal against both the convictions and sentences imposed by the regional court. This Court enquired from counsel whether he understood the task at hand, since it was evident from his heads of argument that he had adopted the incorrect approach. From the bar, counsel responded that he placed reliance on a decision of this Court, *Van Wyk v S*,

Galela v S,[1] where special leave to appeal had been granted in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

So in short accused 1 and 2 then [indistinct] 55 years imprisonment and accused 3 and 4 60 years imprisonment each In respect of count 1 and 3 the sentences to run concurrently, 10 years of the sentence to run concurrently with the sentence in respect of count 2. Count 4 and 5 taking together for the purpose of sentence, 5 years imprisonment I think your conduct clearly demonstrate that you can never be trusted with the [indistinct] of licenced firearms and therefore you remain unfit in terms of Section 102 of the Firearm Control Act. Thank you.'

[18] From the aforesaid, it is clear that the judgment of the regional court on sentence is not particularly helpful and is incoherent. In addition, the high court did not deal with the confusion as set out in the sentences above. Regarding petitions, the high court is not obliged to give reasons for its refusal. It is trite that in terms of s 19(d) of the Superior Courts Act, an appellate court exercising appeal jurisdiction may 'confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require'.

[19] In my view, there was a clear misdirection by the sentencing court in imposing a sentence that is confusing, incoherent and clearly not comprehensible. The high court was obliged to deal with this confusion and failed to do so when it refused the petition. Thus, this Court is none the wiser and is constrained to remit the matter to the high court to deal with the issue of sentence.

[20] Court orders must be framed in unambiguous terms, practical and enforceable. In *Eke v Parsons*,[11] the Constitutional Court stated that there ought to be no doubt or confusion regarding what the order states. The Constitutional Court explained this as follows:

'If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person to whom it applies, the discretion to comply or disregard it.'[12]

[21] It follows that the refusal of the petition for leave to appeal against sentence must succeed.

[22] In the result, I make the following order:

1 Leave to appeal against the refusal of the petition in respect of the conviction is dismissed.

2 Leave to appeal against the refusal of the petition in respect of sentence is granted.

W HUGHES

JUDGE OF APPEAL

Appearances

For the appellants: M Khonou

Instructed by: Mosiapoja Attorneys, Protea Glen

Reynard & Associates Inc., Bloemfontein

For the respondent: J F Masina

Instructed by: The Director of Public Prosecutions, Johannesburg

The Director of Public Prosecutions, Bloemfontein.

[1] Van Wyk v S, Galela v S [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA).

[2] Ibid para 39.

[3] S v Khoasasa [2002] ZASCA 113; 2003 (1) SACR 123 SCA; [2002] 4 All SA 635 (SCA).

[4] S v Matshona [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) (Matshona).

[5] Tonkin v S [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) (Tonkin).

[6] Dipholo v The State [2015] ZASCA 120.

[7] Mthimkhulu v S [2016] ZASCA 180.

[8] De Almeida v S [2019] ZASCA 84.

[9] Tonkin para 3 quoting Matshona para 4; Ntuli v The State [2018] ZASCA 164 para 4; S v Kriel [2011] ZASCA 113; 2012 (1) SACR 1 (SCA) para 11-12; S v Smith [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 2-3.

[10] S v Bogaard [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41.

[11] Eke v Parsons [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 64.

[12] Ibid para 74.

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