

SOUTH AFRICA / JUDGMENT

Matona v S (CA16/2024) [2025] ZANWHC 59 (27 March 2025)

[2025] ZANWHC 59

COURT

North West High Court, Mafikeng

BEFORE

DJAJE, WESSELS

CASE / FILE NUMBER

CA16/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER:CA16/2024

In the matter between:

LANGA MATONA
APPELLANT
and
THE STATE
RESPONDENT

Coram:

DJAJE DJP et WESSELS
AJ
Date: 27 March 2025
ORDER

- i.
Condonation for the late filing of the notice of appeal is granted.
- ii.
The appeal is dismissed.

JUDGMENT

- [1] This is an automatic appeal from the Regional Court for the Regional Division North West Held at Klerksdorp against a life sentence imposed in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977[1] (CPA) read with the provisions of Rule 67(5A)(a)(i) of the Rules of the Magistrate's Court.

Facts

- [2] The accused was convicted of murder together with his two co-accused.
- [3] This conviction emanates from an incident that took place in Kanana in the Klerksdorp area. Early in the morning of 21 December 2021, the appellant, accompanied by his two co-accused, investigated a theft of property from the residence of the appellant. The investigation led the appellant and his co-accused to the paternal home of the deceased where certain stolen items, belonging to the appellant, were found. Because the deceased could not be found at his paternal home the appellant and his co-accused persevered with their search and found the deceased at another location later the same day.
- [4] When the deceased was apprehended by the appellant and his co-accused, he was continuously and viciously assaulted over an extended period on three separate occasions, mainly by the appellant. The deceased succumbed in hospital to the wounds sustained as a result of the assault during the evening of 21 December 2021.

Conviction and sentence

- [5] On the first charge (of murder), the appellant was convicted of murder on the grounds of common purpose. For this conviction, the appellant was sentenced to life imprisonment in terms of the provisions of Schedule 2 Part I of s 51(1) of the Criminal Law

Amendment Act[2].

- [6] The appellant pleaded guilty, on the second charge, to the provisions of s 49(1)(a) of the Immigration Act[3]. This charge emanates from the fact that the appellant, being a citizen of Lesotho, unlawfully entered the Republic of South Africa where he remained without being in possession of a passport and/or a valid permanent residence permit and/or being in possession of a valid visa issued by the Director of the Department of Home Affairs. The appellant was sentenced to 12 months imprisonment for this conviction which sentence was to run concurrently with the life sentence imposed for the conviction of murder. The appellant was furthermore declared unfit to possess a firearm.

Grounds of appeal

- [7] In his notice of appeal, the appellant assails only the life sentence imposed in terms of the conviction of murder. The notice of appeal states that the personal circumstances of the appellant constitute compelling and substantial circumstances, in the consideration whereof the court a quo misdirected itself to find that such circumstances did not justify a departure from the prescribed minimum sentence of life imprisonment.
- [8] As a second ground of appeal, the appellant advanced that the sentence of life imprisonment is shockingly inappropriate in the circumstances and out of proportion to the totality of the accepted facts in mitigation.

Condonation

- [9] The appellant brought an application for the late filing of his notice of appeal which was not opposed by the respondent. The appellant was represented throughout the trial in the court a quo by counsel appointed by the Klerksdorp branch of Legal Aid of South Africa (Legal Aid). The Mahikeng branch of Legal Aid

represented the appellant in this appeal.

- [10] On 20 October 2023, the appellant was sentenced and the notice of appeal was filed on 28 August 2024. As already alluded to, the appellant enjoys the right of automatic appeal to this Court as a result of the life sentence imposed by the court a quo. This right is availed to the appellant by the provisions of s 309(1)(a) of the CPA, the specific provisions whereof read as follows:

‘Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).’

- [11] Although not explicitly stated in the condonation application, the application finds its basis in the provisions of Rule 67 of the Magistrate Court Rules.

- [12] Rule 67(5A)(a)(i) of the Magistrate Court Rules reads as follows:

‘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 within 10 days after the passing of the sentence or order following on the conviction 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.’

(emphasis added)

[13] The reasons advanced for the late filing of the notice of appeal

filed on 28 August 2024 (the second notice of appeal) have been properly canvassed in the condonation application.

[14] What the appellant seems to have lost sight of in his condonation

application is that a previous notice of appeal, noting an appeal against conviction and sentence, was filed by the appellant’s

attorneys on 1 November 2023 (the first notice of appeal). It is unclear whether the appellant was appraised of the existence of the first notice of appeal. What the presence of the first notice of appeal indicates is that Legal Aid received instruction

after sentencing to lodge an appeal.

[15] Although the first notice of appeal does not contain any grounds of appeal it had been filed with the court a quo within the period as set out in Magistrate’s Court Rule 67. Unlike the first notice of appeal, the second notice of appeal contains the grounds of appeal and it abandons the appeal against the conviction.

[16] The respondent did not allege any prejudice suffered resulting from

the late filing of the second notice of appeal which would explain the respondent’s disinclination to oppose the condonation

application.

[17] What is clear from the appellant’s explanation in his condonation application is that the appellant made constant attempts to have his appeal prosecuted while incarcerated following his sentence. The failure of the appellant’s attorneys to prosecute the appeal is strikingly absent from the condonation application.

[18] These attempts of the appellant culminated in the Mahikeng branch of Legal Aid filing the second notice of appeal which ultimately brought the appeal before this Court.

[19] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*[4] the Supreme Court of Appeal (SCA) spoke to the, now trite, factors to be considered in the exercise of a court’s discretion to grant or refuse condonation. These factors are:

‘...the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice...’

[20] It is settled that a court would generally be loath to punish a party for the failures of the legal representative of that party. See in this regard *Huysamen & another v Absa Bank Limited & others*[5] wherein the SCA stated the following:

‘The question is whether the applicants’ condonation application should be granted despite their attorney having been remiss in fulfilling his duty to them. Courts, in general, are ordinarily loath to penalise a litigant on account of his attorneys’ negligence. But in *Reinecke*,⁹ this Court warned litigants that the time had come that it should be no excuse. Attorneys are members of the Court. The Court expects them to know and uphold the Rules of the court in which they practise. A litigant can derive no benefit from the ineptitude of his attorney. After all the attorney is the litigant’s chosen legal representative. If one’s legal representative has poorly executed the mandate, one must suffer the consequences. In any event, the applicants themselves are not without blame. It would be unreasonable to accept that once a client has given instruction to an attorney, he or she can sit back and do nothing.’

[21] Clearly, the appellant did not remain idle in the process as his repeated attempts to have his appeal prosecuted sparked the interest of the Mahikeng branch of Legal Aid who then took the necessary further steps in the prosecution of the appeal.

[22] An explanation by the attorney seized with the appeal in the Klerksdorp branch of Legal Aid would have given the necessary context to the failure to prosecute the appeal with some sense of urgency. The absence of such an explanation cannot be laid before the door of the appellant.

[23] The inescapable conclusion to be drawn is that the appellant’s attorneys were to blame for the delay caused in the prosecution of the appeal as well as the late filing of the second notice of appeal.

[24] What is clear from the founding affidavit to the condonation application is that while the appellant awaited the execution of his instructions in the prosecution of the appeal, the appellant took all necessary steps to bring the appeal before this Court. The appellant should not suffer any ill effects for the unenthusiastic manner in which the Klerksdorp branch of Legal Aid initially prosecuted this appeal.

[25] As a result, the application for condonation for the late filing of the notice of appeal stands to be granted.

Merits of appeal

[26] The notice of appeal is non-descript and does not indicate which

personal circumstances and to what extent those personal circumstances should have influenced the Regional Court to deviate from the minimum sentence.

[27] In the judgment of *Malgas v S*[6] the SCA made the following remarks in relation to the justification for the interference of an appeal court with the sentence of the trial court with specific reference to the "shocking", "startling" or "disturbingly inappropriate"

nature of the sentence of the trial court.

However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

[28] The court a quo weighed up the appellant's personal circumstances which his counsel argued are substantial and compelling circumstances warranting the deviation from the prescribed minimum sentence against the aggravating circumstances. In this process, it was found that the following aggravating circumstances were present which will be dealt with forthwith.

[29] The mother of the deceased was a witness to the assault of the deceased which led to his death. The appellant threatened the deceased's mother and one of the witnesses (for the respondent)

in pursuance of the search for the stolen property.

[30] Particular weight was placed on the fact that the appellant was

illegally in South Africa at the time of the murder. When some of the stolen goods were recovered from the paternal residence of the deceased, the appellant (and the co-accused) had the option to report the matter to the police and to leave the investigation in their hands. The appellant (and the co-accused) elected to go in search of the deceased who they eventually found and killed.

[31] As a result of the continued nature of the assault, the deceased died a very painful death. The court a quo furthermore found that the appellant had not shown any signs of remorse, even after he had been convicted.

[32] No evidence was put before the court a quo in relation to mitigating factors to be taken into account in the process of sentencing. In argument, counsel for the appellant set out the following personal circumstances of the appellant:

32.1. At the time of conviction, the appellant was 46 years of age.

32.2. The appellant has two children, being a daughter of 22 years of age and a son of 17 years of age.

32.3. The appellant grew up in Lesotho and the highest level of education held by the appellant is the equivalent of grade 7 in South Africa. Although not stated what the nature of the appellant's employment is, it was advanced that the appellant earned R2000 per month.

32.4. The appellant holds no previous convictions.

[33] No case has been made out in this appeal as to what extent the above-stated personal circumstances of the appellant sufficiently

qualify as substantial and compelling reasons to persuade this Court deviate from the minimum sentence imposed by the court a quo.

[34] The personal circumstances of the appellant are not unique and are to a great extent universally applicable to a greater proportion of society. To this extent, the remarks of the Supreme Court of Appeal in *S v Vilikazi*[7] are indicative of the weight that should be given to the mitigating factors such as those advanced by the appellant. I quote from paragraph 58 of this judgment:

"The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment."

(emphasis added)

[35] Having considered the merits of the appeal, it is concluded that the personal circumstances of the appellant do not constitute substantial and compelling circumstances as set out in Section 51(1) of the Criminal Law Amendment Act 105 of 1997. There is therefore no reason to deviate from the minimum sentence of life imposed by the court a quo.

Order

[36] Resultantly the following order is made:

- i. Condonation for the late filing of the notice of appeal is granted.
- ii. The appeal is dismissed.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

I agree

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Date of hearing

: 24 January 2025

Date of

judgment

: 27 March 2025

APPEARANCES

Counsel for Appellant : Mr T Gonyane

Instructed by

: Legal Aid South Africa (Mahikeng)

Mahikeng

Counsel for Respondent : Adv W P Ndhlovu

Instructed by

: Director of Public Prosecutions

(North West)

Mmabatho

[1] Criminal Procedure Act 51 of 1977

[2] Criminal Law Amendment Act 105 of 1997

[3] Immigration Act 13 of 2002

[4] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd
and Others (619/12) [2013] ZASCA 5 para 11

[5] Huysamen & another v Absa Bank Limited & others (660/2019)

[2020] ZASCA 127 par 14

[6] Malgas v S (2001) 3 All SA 220 (A) at 229 par 12

[7] S v Vilakazi (576/07) [2008] ZASCA 87 par 58

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