

SOUTH AFRICA / JUDGMENT

Sithole v S (CC 55/2005) [2021] ZANWHC 6 (11 February 2021)

[2021] ZANWHC 6

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

CC 55/2005

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IN THE NORTH WEST HIGH
COURT, MAHIKENG
CASE NO: CC 55/2005

Reportable:	YES/NO
Circulate to Judges:	YES/NO Circulate to
Magistrate:	YES/NO Circulate to Regional
Magistrates:	YES/ NO
In the matter between:	NORMAN KAVITO SITHOLE Applicant and THE STATE Respondent DATE OF HEARING : 29 JANUARY 2021 DATE OF JUDGMENT : 11 FEBRUARY 2021 COUNSEL FOR APPLICANT : MR. KEKANA

COUNSEL

FOR THE RESPONDENTS : ADV. MOKONE
JUDGMENT ON
APPLICATION FOR LEAVE TO APPEAL

Delivered: This
judgment was handed down electronically by circulation to the
parties' representatives by email. The date and time for
hand-down is deemed to be 10H00 on 11 February 2021.

ORDER

Consequently, the

following order is made: (i)
Condonation
for the late noting and prosecution of the application for leave to
appeal is granted.

(ii)

Leave

to appeal against conviction and sentence is refused.

JUDGMENT

HENDRICKS DJP

Introduction

[1] The applicant Mr. Norman Kavito Sithole who was accused 2 during the trial, was together with his co-accused Mr. Michael Mukurukunje Ndlovu, convicted of murder and robbery with aggravating circumstances on 09th February 2006. With regard to the murder charge he was sentenced to life imprisonment and twenty (20) years imprisonment for the count of robbery with aggravating circumstances. On 29th January 2021 an application for leave to appeal against conviction and sentence was argued and judgment was reserved. Coupled with the application for leave to appeal was also an application for condonation for the late noting and prosecuting of the application for leave to appeal.

Condonation

[2] As far as the condonation application is concerned, it is quite apparent that almost fifteen

(15) years has passed since the trial was finalized. Without any stretch of the imagination, this is an inordinately long delay. However, to the advantage of the applicant, it must be stated that some parts of the record went missing and other parts could not be transcribed. An application was made for the reconstruction of the record on the best secondary evidence available. An order to that effect was made on 17th April 2020. This was equally after a very long passage of time.

[3] It is trite that condonation is not for the mere asking. Neither is an applicant entitled to be granted the requisite condonation as of right as though it is for the mere taking. This Court stated in *Shabalala vs Goudini Chrome (Pty) Ltd and Another* (M342/2016)

[2017] ZANWHC 77 (2 November 2017) that:

"[3] Condonation is not for the mere asking. It is incumbent upon an applicant in an application for condonation to prove that (s)he/it did not wilfully disregard the timeframes provided for in the Rules of Court. Furthermore, that there are reasonable prospects of success on appeal. In *Melane v Southern Insurance Co Ltd* 1962 (4) SA 531 (AD) at page 532 B-E, the following is stated about the factors that will be taken into account when considering a condonation application:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a 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 therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[4] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* (619/12)

[2013] ZASCA 5 (11 March 2013), the following is stated:

"[11] Factors which usually weigh with this court in considering an application for condonation include 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 (per Holmes JA in Federated Employers Fire & General Insurance Co Ltd & another v McKenzie 1969 (3) SA 360 (A) at 362F-G). I shall assume in Dentenge's favour that the matter is of substantial importance to it. I also accept that

there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors.

[12] In *Uitenhage Transitional Local Council v South African Revenue*

Service 2004 (1) SA 292 (SCA) para 6 this court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date,

duration and extent of any obstacle on which reliance is placed must be spelled out.'"

[5] In *Mtshali & others v Buffalo Conservation 97 (Pty) Ltd* (250/2017) [2017] ZASCA 127 (29 September 2017), the following is stated:

"[37] The approach of this court to condonation in circumstances such as the present is well-known. In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others Ponnann JA held

that factors relevant to the discretion to grant or refuse condonation include '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'.

[38] In *Darries v Sheriff, Magistrate's Court, Wynberg & another*

these general considerations were fleshed out by Plewman JA when he stated:

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[39] Reference was made in the passage I have cited above to it being an erroneous assumption that if the cause of the delay in complying with the rules is the conduct of the appellant's attorney,

condonation will be granted. That assumption was dispelled in no uncertain terms in *Saloojee & another NNO v Minister of Community*

Development. In that matter the notice of appeal, the record and the condonation application were filed some eight months late. After considering the explanation given for the delay and concluding that it was not even ‘remotely satisfactory’ Steyn CJ proceeded to hold:

‘I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.’

[40] While the various factors that have been listed in the cases should

be weighed against each other, there are instances in which condonation ought not to be granted even if, for instance, there are

reasonable prospects of success on the merits. This was alluded to in the passage that I cited from the Darries matter. In *Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another* Nestadt JA said that this court ‘has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are’ and that this applies ‘even where the blame lies solely with the attorney’.

[41] In the present case we did not hear argument on the merits. Counsel

were asked to make their submissions on the assumption that an appeal would have reasonable prospects of success. The appellants’

counsel went further, submitting that his clients’ prospects of success on the merits – the peremption point aside – were strong. An assumption to this effect does not change the outcome on the particular facts of this case.”

[6] In *Mathibela v The State* (714/2017) [2017] ZASCA 162 (27 November 2017) the following is stated:

“[5] This Court recently stated the following in Mulaudzi v Old Mutual Life Insurance Company Limited & others, National Director of Public Prosecutions & another v Mulaudzi:

‘[34] In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*, it is advisable, where application for condonation is made; that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.

This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.'

(My emphasis)

[6] The same principles apply in the context of criminal cases as restated in *Mogorosi v State* where this Court said:

'[3] . . . [G]iven that the appellant was seeking an indulgence he had to show good cause for condonation to be granted. In *S v Mantsha* 2009

(1) SACR 414 (SCA) para 5 Jafta JA stated that "good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal'

[8] A court considering an application for condonation must take into account a range of considerations. Relevant considerations include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice. (See *S v Di Blasi* 1996 (1) SACR 1 (A) at 3g.)'

[7] The appellant provided no reasonable explanation for his non-compliance with the rules of this Court. The delay in prosecuting his appeal in this Court alone amounted to one year and one month. In total ie in both the court a quo and this Court it took the appellant eight years and one month to prosecute his appeal. Even if I take into account the fact that he was unrepresented at times during the prosecution of his appeal, that can hardly compensate for the inordinate delay in his application.

[8] As pointed out in *Uitenhage Transitional Local Council v South African Revenue Service* the requirements for granting an application for condonation are the following:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preperation of appels to this Court: condonation is not to be had merely for the asking:

a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[9] As was the case in Mulaudzi, as is apparrent, the founding affidavit is singularly unhelpful in explaining the long delay. The explanation is not in the least satisfactory. Even worse, no explanation was provided for the third application for condonation and reinstatement of the appeal. This delay is unreasonable and there is no cogent explanation for it. It remains to consider whether the prospects of success on the merits justify the granting of condonation.”

[7] There are long periods of time that are unexplained in the affidavits filed. Although this is very much undesirable and falls short of what is required from an applicant in an application for condonation, I am of the view that the requisite condonation should be granted in the interest of justice, seeing that the applicant was all along desirous

to prosecute his application for leave to appeal. The lacunas in the time periods can be condoned.

Grounds of appeal

[8] The application for leave to appeal is premised on the following grounds:

“AD CONVICTION.

1. The Honourable court a quo erred in finding that the State succeeded in proving the guilt of the applicant beyond reasonable doubt.
2. The Honourable court erred in finding the version of applicant to be not reasonably possibly true.
3. The Honourable court erred in accepting the evidence of the two state witnesses when it comes to identification of the perpetrators and rejecting Applicant's version that he was home at all material times.
4. The Honourable court a quo should have found that their evidence on identification was unreliable and unsatisfactory, taking into account that the incident happened at night and it was a mobile scene and the identifying witnesses were in shock as perpetrators where wielding firearms and fired shots.
5. The Honourable court erred in not seeking for corroboration of the version of state witnesses from any independent source or any other evidence.
6. At the time of the incident the identifying witnesses testified that they had not seen applicant for more than a year and that he was wearing a cap on the head at the time of the incident. That should have raised a red flag in terms of increasing chances of mistaken identification.
7. There was no other evidence linking applicant to the commission of the offence other than the say so of the two state witnesses who are a mother and daughter and could have discussed the case prior to testifying.

AD SENTENCE

8. The Honourable court erred in imposing a sentence of life imprisonment on appellant in respect of murder charge in that, it has not been shown that on the facts of this case life imprisonment was proportionate to the crime, the criminal and the interests of society.
9. The Honourable court erred in finding that there were no substantial and compelling circumstances.
10. The Honourable court should have found that a determinate sentence in respect of count I was proportionate to the crime, criminal and interests of society.
11. The Honourable court erred in imposing a sentence of 20 years in respect of an offence of robbery with aggravating circumstances for a first offender.”
- [9] The central issue contained in the grounds of appeal as far as the conviction is concerned, is the identification of the applicant. This Court in its judgment on the merits dealt with the issue of identification in great detail, and same need not be regurgitated herein. Suffice to state that the two eye witnesses Duminsani Bisi and Gloria Bisi corroborated each other in all material respects and positively identified the applicant as one of the perpetrators. There was

sufficient illumination for these witnesses to be able to positively identify the applicant. He was well known to them to the extent that they even know his nickname. This nickname was conceded to by the applicant. They even know his place of residence. This Court, having applied the cautionary rule with regard to identity, was satisfied that the identity and involvement of the applicant as one of the perpetrators of these offences, were indeed proven by the State beyond any reasonable doubt. There are no reasonable prospects of any success on appeal insofar as the conviction is concerned.

[10] Section 17 of the Superior Court Act 10 of 2013 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. No other court would come to a different decision than what this Court had arrived at.

Sentence

[11] As far as sentence is concerned, it was submitted on behalf of the applicant that this Court erred in imposing life imprisonment as a sentence on count 1, the murder charge, as “it has not been shown that on the facts of this case life imprisonment was proportionate to the crime, the criminal and the interest of society.” Furthermore, that this “Court erred in finding that there were no substantial and compelling circumstances and in not imposing a lesser sentence than the minimum sentence prescribed by law.”

[12] In imposing a suitable sentence upon the applicant as accused 2, this Court took into account all the factors relevant for the impositioning of a suitable sentence. The personal circumstances of the applicant, the nature and seriousness of the offences committed, as well as the interest of society were indeed taken into consideration. None of these factors were either over-or under-emphasized, but were carefully balanced in order to arrive at an appropriate sentence.

[13] In his Heads of Argument on behalf of the applicant, Mr. Kekana state:

“I accept that the court found that the offence was preplanned and executed in the furtherance of a common purpose.”

This concession is indeed well made. The Criminal Law Amendment Act 105 of 1997 is clear. Section 51 (1) read with the provisions of Part 1 of Schedule 2, prescribe life imprisonment as a sentence for murder when it was planned or premeditated; when the deceased died in the execution of a robbery with aggravating circumstances; and also when the murder was committed by a person, group of persons or syndicate acting in the execution or furthermore of a common purpose or conspiracy. It is clear from the evidence tendered and accepted by this Court during the trial, that the applicant and his co-accused acted in concert with one another in the furtherance of a common purpose and the death of the deceased occurred as a result of robbery with aggravating circumstances.

[14] It was furthermore contended that this Court erred in imposing a term of imprisonment of twenty

(20) years in respect of count 2 (robbery with aggravating circumstances), since the applicant was a first offender. With due respect, this contention is wrong. The applicant has a relevant previous conviction. As a second offender, the prescribed sentence is that of twenty (20) years imprisonment.

See: Criminal Law Amendment Act 105 of 1997.

With regard to sentence too, there are no reasonable prospects that another court would come to a different decision than what this Court had arrived at. The application for leave to appeal with regard to sentence too, should fail.

See: S v Malgas 2001 (1) SACR 469 (SCA)

S v Matyityi 2011 (1) SACR 40 (SCA)

Order:

[15] Consequently, the following order is made:

- (i) Condonation for the late noting and prosecution of the application for leave to appeal is granted.
- (ii) Leave to appeal against conviction and sentence is refused.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG.

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