

SOUTH AFRICA / JUDGMENT

# Zwelinzima and Another v S (CA 59/2019)

## [2022] ZANWHC 56 (5 December 2022)

**[2022] ZANWHC 56****COURT**

North West High Court, Mafikeng

**BEFORE**

Hendricks, Reddy

**CASE / FILE NUMBER**

CA 59/2019

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**Source record****IN****THE NORTH WEST HIGH COURT, MAFIKENG****CASE****NO: CA 59/2019****Reportable:**NO  
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In**the matter between:**MASIBI  
ZWELINZIMA  
1st Appellant  
MOOKI  
MARUPING  
2nd Appellant  
and  
THE  
STATE  
Respondent**CORAM:**HENDRICKS JP et REDDY AJ  
DATE  
OF HEARING  
: 25  
NOVEMBER 2022  
DATE

OF JUDGMENT : 06 DECEMBER 2022  
FOR  
THE APPELLANT  
: MR  
GONYANE  
FOR  
THE RESPONDENT  
: ADV  
CHULU

## JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 05 December 2022.

## ORDER

Consequently, the following order is made:

- (i) Condonation for the late noting and prosecution of the appeal is refused.
- (ii) The appeal against the sentence of life imprisonment on count 2 (rape) fails and the sentence is confirmed.

Hendricks JP

## Introduction

- [1] The appellants Messrs Zwelinzima Masibi and Maruping Mooki were arraigned before the Regional Court, Klerksdorp on charges of theft and rape. They pleaded guilty to both counts and were sentenced to undergo an effective term of six (6) years imprisonment on the count of theft and life imprisonment on the rape charge. The sentences on the respective counts were ordered to run concurrently in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977, (the CPA) as amended, although they run concurrently ex lege in terms of the Criminal Procedure Amendment Act 105 of 1977, as amended. They, in terms of their automatic right of appeal, appeal the sentence of life imprisonment on the rape count (count 2). This appeal therefore only lies against the sentence of life imprisonment imposed on the rape count and not against either of the convictions and the sentence of six (6) years for theft, as well as the fact that they were both declared unfit to possess a fire-arm in terms of section 103 of the Firearms Control Act 60 of 2000.
- [2] They both also applied for condonation for the late prosecution of their appeal. They were convicted and sentenced on 02 May 2019. In their affidavits in support of the applications for condonation they state that after being sentenced, they expressed their desires to appeal the sentence of life imprisonment. This happened on the very same day. They were however

informed that the record of proceedings need first to be transcribed. They were transferred to various correctional facilities which made it difficult to prosecute their appeal. They do not explain the delay in detail and only gives a cursory overview of what caused the delay. This is insufficient.

- [3] It is expected of an applicant in an application for condonation to explain in detail the cause of the delay in order to satisfy the court that the requisite condonation be granted. 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. It is stated in *Shabalala vs Goudini Chrome* (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 no 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 is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are 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.'

[51] 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) it 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 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 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 apparent, 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] One of the factors to be considered for the granting of condonation is the prospects of success on appeal. The greater the prospects of success on appeal, the more likely a court will be inclined to grant condonation. Good prospects of success compensate a feeble explanation of the delay. This Court will therefore consider the appeal and the prospects of success thereof in order to determine whether the requisite condonation should be granted.
- [8] The appeal against sentence is premised on the ground of appeal that the sentence of life imprisonment is excessive and that the trial court erred in its finding that there are no substantial and compelling circumstances present, which warranted a deviation from imposing life imprisonment as a suitable sentence.
- [9] The facts of this case as stated in the section 112 (2) statements of the appellants, which mirror image each other, are that on the morning of 10th September 2018 at approximately 01H30, they went to the house of the complainant. The complainant upon hearing a noise enquired who was there. They did not answer. They saw the complainant trying to escape through a window. They blocked her and prevented her from escaping. The complainant then proceeded to the front door in an attempt to escape but again to no avail, as they prevented her once again from escaping. They forced her back into the house, and they both entered the house.
- [10] The complainant was instructed to go to the bedroom. The first appellant accompanied the complainant to her bedroom. He instructed her to undress and she obliged. He then had sexual intercourse with her without her consent. Whilst he was having sexual intercourse with the complainant, the second appellant searched for money and valuables inside the house. After he finished his sexual encounter, the second appellant entered the bedroom and had sexual intercourse with the complainant also without her consent. The first appellant then likewise ransacked the house in search of money and valuables. They took R300.00 cash, a DSTV decoder and simcard, a kettle, a pair of shoes, a Hanna Montana bag and an adaptor, all to the total value of R3380.00. They were arrested the very same day being in possession of the said goods, except for the R300.00 cash amount which they spend on meat. Except for this amount of cash, all the other items were recovered.
- [11] They also, in their section 112 (2) statements, made a number of admissions. They admitted that the complainant was medically examined and that a medical form (J88) was completed by the medical practitioner; that DNA samples were collected from the complainant's body; that control samples of their DNA were taken, correctly sealed and sent for forensic analysis; that their DNA were retrieved from the complainant. The correctness of the contents of the documents (J88 and forensic reports) were admitted as well as the process of analysing and the procedure followed and applied. The State accepted their versions of events as outlined in their pleas and no evidence was presented in rebuttal thereof. The learned Regional Magistrate, being satisfied that all the elements of the two crimes been admitted, returned a guilty verdict. That this judgment is indeed correct behoves no argument.

[12] The following personal and mitigating circumstances were placed on record with regard to the appellants. As far as the first appellant is concerned, he was 24 years of age at the time of the commission of the offences; he is single and has no dependants; he is a farm worker earning R2000.00 per month; his highest standard of education is Grade 10; he has a previous conviction of housebreaking with intent to steal and theft. Insofar as the second appellant is concerned, he was 23 years of age; single; he has a child aged three (3) who is staying with the biological mother; he was unemployed; he is a first offender; and his highest educational qualification is Grade 7.

[13] As alluded to earlier, the appellants were charged with rape (count

2) read inter alia with the provisions of Section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, in that the complainant was raped more than once by more than one person. In both their Section 112 (2) statements, they stated:

*“My legal representative has further explained to me the provisions of Section 51 (1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that if convicted a term of life imprisonment can be imposed by the Honourable Court.”*

That the appellants were duly appraised of the applicable minimum sentence regime is beyond any question. This Court, as court of appeal, has to determine whether there was any misdirection in imposing the prescribed minimum sentence of life imprisonment for the rape count.

[14] In *S v Malgas* 2001 SACR 469 (SCA) at page 478d-h the following is stated:

*“[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be, a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. 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.”*

[15] In *S v Malgas*, *supra* it was held that:-

*“[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary -*

A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.”

[16] In *S v Matyityi* 2011 (1) SACR 40 (SCA), the following is stated:

*“[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”*

[17] Looking holistically at the personal circumstances and mitigating features of each of the two appellants, I am of the view that it is not compelling and substantial to deviate from imposing the prescribed sentence of life imprisonment. It was contended that the relative youthfulness of the appellants was overlooked by the trial court. In this regard, I find the dictum in *S v Matyityi*, supra, quite apposite. A court should not deviate from imposing the prescribed sentence of life imprisonment for flimsy reasons such as “relative youthfulness”.

[18] In my view, there was no misdirection committed by the trial court. The sentence is fair, just and appropriate under the circumstances of this case. Sight should not be lost of the fact that these offences were perpetrated in the wee-wee hours of the morning, against a vulnerable member of society (a woman), who was attacked whilst she was in the sanctity and safety of her house. She was attacked by two men who prevented her twice from escaping and trying to flee from their attack. She was raped by both men in the presence of each other and also deprived of her valuables (money and other property). I am therefore of the view that the appeal against sentence should fail. Likewise, condonation should also not be granted, as there are no prospects of success on appeal.

Order

[19] Consequently, the following order is made:

- (i) Condonation for the late noting and prosecution of the appeal is refused.
- (ii) The appeal against the sentence of life imprisonment on count 2 (rape) in respect of both appellants fails and the sentences are confirmed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

A REDDY

ACTING JUDGE OF THE HIGH COURT,

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