CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 329/17

In the matter between:

OSCAR VUSI THWALA Applicant

and

THE STATE Respondent

Neutral citation:	*Thwala v S* [2018] ZACC 34
Coram:	Mogoeng CJ, Zondo DCJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgments:	Froneman J
Decided on:	27 September 2018
Summary:	Section 35(3)(o) of the Constitution — right to a fair trial — Res Judicata

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ORDER

The following order is made:

1. The application for condonation is granted.
2. Leave to appeal is refused.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Zondo DCJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

[1] The applicant was convicted on two counts of abduction, three counts of rape and two counts of possession of a firearm and ammunition[1] in the High Court of South Africa, Gauteng Division, Pretoria (High Court).[2] The High Court imposed three life sentences in terms of section 52(1) of the Criminal Law Amendment Act[3] (Minimum Sentences Act) for the charges of rape with aggravating circumstances, and a further nine years imprisonment for the remaining charges.

[2] The applicant asks for both his conviction and sentence to be set aside and to be immediately released or granted leave to appeal to the Full Court of the High Court. He also seeks to lead further evidence of reports from DNA tests conducted after his conviction and sentencing.

[3] The applicant contends that his conviction and sentencing were substantively unfair on five main bases:

(a) The High Court made its determination without considering the DNA evidence that was being processed, despite being notified that the evidence would be available within 15 weeks.

(b) The trial proceedings were held in Afrikaans when neither the applicant nor his representative understood Afrikaans.

[1] Contraventions of sections 2 and 36 of the Arms and Ammunition Act 75 of 1969.

[2] *S v Raulinga and Thwala*, unreported judgment of the North Gauteng High Court, Pretoria, Case number 79/03 (22 May 2003).

[3] 105 of 1997.

(c) The applicant was not informed of the applicability of the Minimum Sentences Act until the beginning of the sentencing proceedings.

(d) The sentencing proceedings were irregular because the presiding Judge failed properly to consider whether substantial and compelling circumstances existed for deviating from the prescribed minimum sentence.

(e) The trial Judge's hostile interventions violated the applicant's right to a fair trial.

[4] The applicant alleges that each of these grounds of substantive unfairness stems from continuous failures of the presiding Judge, prosecutor and defence attorney to properly inform, advise and protect his rights as an accused person under section 35(3) of the Constitution.[4]

Background

[5] This is the third time this Court has had occasion to consider Mr Thwala's case. His sentencing in the High Court dates back to 2003. Leave to appeal was denied on 3 February 2005. In 2012 he applied, unrepresented, to the Supreme Court of Appeal unsuccessfully. He applied again in March 2015, this time represented, and was granted leave to appeal to the Full Court.

[6] The Full Court postponed Mr Thwala's application and ordered Legal Aid South Africa to allocate a representative to him. Within a few days, however, the Supreme

[4] Section 35(3) in relevant part reads:

"Every accused person has the right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

. . .

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."

Court of Appeal withdrew its 2015 order, noting that after its 2012 order it was *functus officio*; that is, the Court had already exercised its jurisdiction in the matter and was not empowered to reconsider its final decision.

[7] The applicant, again unrepresented, applied for leave to appeal to this Court in February 2016. His application was dismissed for lack of prospects of success in May 2016. Then, on 10 October 2016, he wrote to the Court pleading for "legal sympathy". The Court responded, in February 2017, advising that he should approach the Legal Aid Board for assistance in lodging a proper application that could be considered by the Court followed by instructions on the procedure for lodging a formal application.

[8] In the interim, Mr Thwala had engaged the services of Lawyers for Human Rights (LHR). LHR attempted to re-enrol the matter at the High Court on the basis of the second Supreme Court of Appeal order but was directed by the Acting Deputy Judge President to approach this Court instead.

Condonation

[9] Owing to its convoluted litigation history, there is no clear date by which to determine the delay in filing this application. Mr Thwala's attorneys calculate a delay of over 18 months from May 2016, when this Court granted condonation to the applicant but refused leave to appeal. This is not without its complications, but any delay is sufficiently explained and did not prejudice the state in opposing the application. As a result, condonation is granted.

Res judicata

[10] The *res judicata* doctrine prohibits the reconsideration of a case already finally determined. In criminal law, this operates as a general rule against appealing a decision on conviction or sentencing more than once, regardless of a change in grounds of

appeal.[5] Important policy considerations underlie this doctrine, including the need for finality on conviction and to protect courts from unending, frivolous litigation.[6]

[11] The doctrine is not absolute. In *Molaudzi*, this Court recognised that it could relax the doctrine and revisit its past decisions in exceptional circumstances.[7] The applicant contends that his case is sufficiently exceptional to warrant relaxation of the doctrine. His attorney notes in her founding affidavit that, as in *Molaudzi*, the applicant was unrepresented in 2016 when he lodged his application with this Court. As a result, his application failed to raise relevant constitutional issues and "lacked structure and clarity". She asserts that the application of *res judicata* here severely prejudices the applicant primarily because he was unrepresented when he made his first application. This, she says, would be a "grave injustice".

[12] The State, however, considers this case a "textbook example providing the reason for the existence of the principle of *res judicata* in the South African law". They note in their answering papers that, despite the applicant not being represented, this Court had all the necessary information to make a decision in 2016, including a complete case record and the DNA report.

[13] But the applicant is correct that not all issues were fully canvassed in the 2016 application. These include new allegations of the Judge "descend[ing] into the arena" of the Court and unfairness arising from the proceedings being held in Afrikaans. However, these grounds are not divisible from the remainder of the appeal on conviction for the purposes of *res judicata*. A criminal appeal cannot be *res judicata* in some respects and appealable in others.[8] Our starting point, therefore, must be, as it was in *Molaudzi*, that this matter is *res judicata*.

[5] *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para 19.

[6] Id at para 20. See also *Bertram v Wood* (1893) 10 SC 177 at 180.

[7] *Molaudzi* above n 5 at para 45.

[8] Id at para 19 provides:

[14] Still, *Molaudzi* empowers this Court to reconsider cases in "truly exceptional circumstances" where the interests of justice "cry out" for a remedy.[9] Is Mr Thwala's such a case?

[15] This case is entirely distinguishable from *Molaudzi*. There, the unrepresented applicant was invited to apply to this Court for reconsideration after the Court overturned the convictions and sentences of two co-accused persons. The co-accused persons were represented and had lodged an application with this Court which was successful on appeal. As a result, an arbitrary distinction arose between Mr Molaudzi and two others convicted of the same crimes on the same evidence.

[16] Though in the end it relaxed the *res judicata* doctrine, this Court in *Molaudzi* noted in strong terms that it did so with great circumspection. It warned:

> "The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter."[10]

[17] In Mr Thwala's case, this Court properly considered the fairness of his trial in 2016. It was alerted to the Supreme Court of Appeal's error in reconsidering his application when it was *functus officio* and to the Court's withdrawal of its second order, as it was enjoined to do. This Court also evaluated the impact of the DNA evidence and concluded that, in circumstances of gang rape, the fact that spermatozoa matched a co-accused and not the applicant is not significant.

> "Thus it appears that in the criminal context the 'cause of action' is more aptly regarded as the conviction or sentence as a whole. An accused who has been convicted and sentenced, generally may not appeal against the decision more than once – despite changing the grounds for appeal."

[9] Id at paras 37-8.

[10] Id at para 37.

[18] The applicant's attorney describes the DNA evidence as "not exculpatory on its own . . . [but] material when considered within the context of the meagre evidence adduced in the applicant's trial". We disagree. The discrepancies between the witnesses' statements are immaterial and the consistency between the two accomplices' evidence and that of the complainant convincingly implicates the applicant. Conversely, the applicant's testimony was extremely poor. He contradicted himself and faltered palpably under cross-examination when confronted with the strong evidence of his accomplices and the damning testimony of the survivor. This Court rightly dismissed the application on the basis of lack of prospects of success.

[19] The new grounds of unfairness now raised do not demonstrate that "significant or manifest injustice would result, should the order be allowed to stand".[11] We have carefully considered the trial Judge's interventions and comments, of which the applicant complains. To do so, we obtained the original Afrikaans transcript, in addition to the English translation, which the applicant provided. The Judge's interventions were unfortunate but nowhere nearly provide any foundation for a finding that the trial was unfair. Neither do the complaints about Afrikaans amount to a finding that the trial was unfair, given that the applicant was represented and that the proceedings were interpreted. The application therefore falls to be dismissed because it is not in the interests of justice to hear it.

Sentencing

[20] Mr Thwala's application to this Court in 2016 was limited to an appeal on conviction. As a result, this Court may have jurisdiction to consider sentencing. But this too falls to be dismissed for lack of prospects of success and it not being in the interests of justice to hear it.

[21] The applicant raises two grounds on which he seeks to appeal his sentence:

[11] Id at para 45.

(a) First, that he was not properly informed of the potential applicability of the Minimum Sentences Act to his case; and

(b) Second, that his sentence was not properly considered by the presiding Judge in keeping with the requirements of *Rammoko*.[12]

[22] The applicant raises the Minimum Sentences Act for the first time here. He alleges, and the record shows, that the presiding Judge not only failed to notify the applicant and his co-accused of the potential applicability of the Minimum Sentences Act, he also failed to read the charges to them at all. Instead, he asked the defence legal representatives whether they had read the charge sheets to the accused persons and whether they understood the contents of the charge sheets. Both confirmed that they had, and that they did.

[23] The Constitution requires that an accused "be informed of the charge [against them] with sufficient detail to answer it".[13] Whether this has occurred must be determined by a "vigilant examination of the relevant circumstances".[14] The applicant rightly notes that there is a distinction between this case, where he was not informed of the application of the Minimum Sentences Act at all, and the body of precedent dealing with accused persons being actively misinformed by being charged under incorrect sections of the Act.[15]

[24] A further hurdle for the applicant is that the precedent on which his legal representative relies,[16] relates specifically to the content of the charge sheet, whereas the application before us does not allege the charge sheet was insufficient in any way.

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[12] *Rammoko v Director of Public Prosecutions* [2002] ZASCA 138; 2003 (1) SACR 200 (SCA).

[13] Section 35(3)(a).

[14] *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) at para 21.

[15] See, for example *S v Ndlovu* [2017] ZACC 19; 2017 (2) SACR 305 (CC); 2017 (10) BCLR 1286 (CC) (*Ndlovu 1*); *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA); *S v Mashinini* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA); and *S v Ndlovu* [2002] ZASCA 144; 2003 (1) SACR 331 (SCA).

[16] Including: *Legoa* above n 14; *Ndlovu 1* above n 21; *Mashinini* above n 15; and *S v Makatu* [2006] ZASCA 72; 2006 (2) SACR (SCA).

Even if extensive evidence were to be led, we would be unlikely to resolve whether the applicant's attorney in fact informed him of the content of the charge sheet. There is no reasonable prospect that the applicant will be able to prove otherwise and then satisfy the further point that this rendered his sentencing unfair.

[25] On the second ground of alleged unfairness in the sentencing proceedings, the applicant has equally weak prospects of success. He relies on *Rammoko* in arguing that the appropriateness of his sentence was insufficiently interrogated before it was imposed. The reliance is misplaced. In *Rammoko*, no evidence whatsoever was led regarding the applicant's circumstances and, more particularly, the effect of the crime on the victim.[17] The Supreme Court of Appeal remitted the matter specifically for the purpose of receiving a victim impact statement.

[26] In this case, the brutal impact on the victim is clear. In addition, the applicant took the stand in the sentencing proceedings to give evidence in mitigation of sentence. After considering the applicant's personal circumstances, the High Court found that there are "no true mitigating factors" or substantial and compelling circumstances to warrant deviation from the minimum sentence. On this ground too the applicant fails to demonstrate prospects of success.

Order

[27] The following order is made:

1. Condonation is granted.
2. Leave to appeal is refused.

[17] *Rammoko* above 12 at para 13.

For the Applicant:	C Ballard of Lawyers for Human Rights
For the Respondent:	K H Van Rensburg of Public Prosecutions Gauteng Division, Pretoria