IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: CAP 2/2009

In the matter between:

MBAMBISA LANGA & 3 OTHERS **APPELLANT**

and

THE STATE **RESPONDENT**

APPLICATION FOR LEAVE TO APPEAL

KGOELE J

DATE OF HEARING	**:**	**04 MAY 2012**
DATE OF JUDGMENT	**:**	**11 MAY 2012**
FOR THE APPELLANT	**:**	**Advocate M.G. Ndimande**
FOR THE RESPONDENT	**:**	**Advocate N.L. Skibi**

JUDGMENT

KGOELE J:

[1] The applicants, accused 2, 3 and 4 in the court *a quo* were convicted in the Regional Court sitting at Rustenburg on the following charges:-

Count 1 - Robbery with aggravating circumstances

Count 2 - Attempted murder

Count 3 - Unlawful possession of a firearm.

They were sentences as follows:-

Count 1 = Each fifteen (15) years imprisonment

Count 2 = Accused 2 & 4 each Ten (10) years imprisonment

Accused 3 Twelve (12) years imprisonment

Count 3 = Each accused Four (4) years imprisonment

The court *a quo* further ordered that the sentences should run concurrently to such an extent that accused 2 and 4 must each serve at least an effective term of imprisonment of twenty one (21) years and accused 3, twenty two (22) years imprisonment.

[2] In this judgment accused 2 will be referred to as first, accused 3 as second and accused 4 as third applicants respectively. Accused 1, Langa Mbambisa is not part of this proceedings as

he did not make an application.

[3] The applicants applied to the Regional Court for leave to appeal but their applications were not successful. Thereafter the applicants approached this Court by way of a petition seeking leave to appeal. This petition was also dismissed by Acting Madam Justice Nkosi-Thomas with whom Acting Madam Justice Kgoele (as she then was) concurred.

[4] The applicants are now seeking leave to appeal against their respective sentence only to the Supreme Court of Appeal. A condonation application was also filed because their application has been filed out of the prescribed time period.

[5] In an application of this nature it is trite law that the applicant must furnish a satisfactory and acceptable explanation for the delay. In addition, he or she must show that he or she has reasonable prospects of success on the merits of the appeal. See **S v Mantsha 2009 (1) SACR 414 (SCA)**

[6] In **Uitenhage Traditional Local Council vs SA Revenue Services 2004 (1) SA 292 (SCA)** the following was said:-

> "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 in 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 the effects must be furnished so as to enable the court to understand 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".

[7] The applicant's explanation for the delay can be summarised as follows:-

The applicants throughout the trial were legally represented by Advocate Miles, ie 1st applicant and Mr Motlatledi represented 2nd and the 3rd applicants. During the application for leave to appeal the applicants were represented by Mr Nel. When the applicants lodged their petition for leave to appeal, Mr Breedt of Breedt Inc. in Johannesburg was the attorney for all the applicants. The attorney who drafted their petition to this Court, whenever, they enquired telephonically about the results of their application or petition, used to tell them that he is waiting for a date of hearing. The applicants only received the letter from the Clerk of Rustenburg Magistrate's Court (informing them that their petition has been dismissed) on the 7th of August 2009.

[8] The applicants decided to look at other options. They drafted another petition themselves and were assisted by an inmate in prison. This was a petition to the Judge President of the Supreme Court of Appeal. They sent it to the Clerk of Rustenburg magistrate's court and the Clerk sent the same to the Registrar of this Court. The said documents which purport

to be petitions have covering letters dated the 8th of April 2010. The Clerk of the Court upon receipt of the said documents sent a letter to the applicants informing them that their petition has been forwarded to the Registrar of this Court in order to further send the same to the Registrar of the Supreme Court, in Bloemfontein.

[9] After the petition had been filed with the Registrar of this Court, the applicants didn't receive any feedback up until November 2010, when they decided to call the Registrar to enquire about the progress. The Registrar advised them they must approach the Legal Aid for assistance in their petition. As a results of that the applicants wrote a letter dated the 25th of November 2010 which was sent by fax to the offices of the legal aid in Mafikeng.

[10] In as far as the issue of whether there are reasonable prospects of success on the merits of the case, Mr Skibi representing the applicants indicated that he does not have submissions to make in support thereto, he can only put forward the instructions from the applicants as being the reason why they are of the view that there are prospects that another court might find differently from the court *a quo* which are:-

- that the personal circumstances of the applicants cummulatively taken together constitute substantial and compelling circumstances which justify a lesser

sentence than the prescribed minimum sentence of fifteen (15) years imprisonment imposed on them;

- some of the items which were taken during the robbery were recovered, watch and cellular phone;

- the offences were committed simultaneously and they should be ordered to run concurrently.

[11] Mr Ndimande on behalf of the respondent submitted that the delay in bringing this application is almost three (3) years, which according to him should be considered as a gross violation of the rules which cannot be condoned.

[12] He further submitted that it is not true that the Regional Magistrate did not order the sentences to run concurrently. He maintained that the court *a quo* took into account the cumulative effect the sentences he imposed would have had, and had ordered them to run concurrently but with specific directions.

He is of the view that there are no reasonable prospects of another court coming to a different conclusion than that arrived at by the court *a quo*.

[13] The applicants in their explanation for the delay are somehow putting a blame on their attorney of record who drafted the

petition and the Legal Aid Board, who took quite a considerable time in replying to their letter dated 25 November 2010 which was sent by transmitted fax. A careful analysis of their explanation also reveals the following laxity on their part which, they failed to spell out the extent of any obstacle upon which they rely on for their non-compliance with the time frame as required. According to their explanation they became aware that their petition was dismissed on the 7 August 2009. The said documents which purport to be petitions have covering letter dated 8th April 2010. There is no explanation of the delay between the two period which is +- 8 months. There is further no explanation as to what they did to get a feedback from the clerk of the court.

[14] The clerk of the court's letter to the Registrar of this Court is dated 18 May 2010. According to them they did not receive feedback up until November 2010. There is further no explanation as to what they did in the five months period they did not receive any feedback.

[15] After getting direction from the Registrar they wrote a letter dated 25 November 2010. They again waited for the feedback from the Legal Aid for +- 8 months. Although they alleged that they kept on enquiring from the Legal Aid and were informed that the application forms will be sent to them, there is no explanation as to what they did during this period to speed-up the process, taking into consideration that a considerable

amount of delay had already occurred, which they were aware of.

[16] In as far as the prospect of success is concerned, it is trite law that the sentence falls primarily within the discretion of the trial court and that the Court of Appeal would not normally interfere with the sentence imposed by the trial court unless it finds that the trial court misdirected itself in imposing a sentence or that the sentence imposed is shockingly disproportionate to an extend that it induces a sense of shock. See **S v Shaik and Others 2008 (1) SACR 1 (CC) paragraph 72.**

[17] It is further trite law that unless the sentence imposed by the trial court is of such a degree of disparity to that which the Appellate Court would have imposed rendering interference competent and necessary the appellate court would not interfere with such a sentence. See **S v Monyane and Others 2008 (1) SACR 543 (SCA).**

[18] There is no-where in the record of proceeding before the court *a quo* where any misdirection or improper exercise of the discretion of the court is evident. The court *a quo*, correct in my view, made a finding that there were no substantial and compelling circumstances that warranted it to deviate from imposing the minimum sentence prescribed in the counts the applicants were convicted of.

[19] It is quite evident that the court *a quo* did not only take the personal circumstances of the applicants into consideration which were before it, but also the fact that they had spent time in prison. As correctly put by the counsel for the respondent, the court *a quo* based its findings on the fact that the aggravating circumstances that exist in this matter far outweighs the personal circumstances of the accused. In fairness to the applicants, it ordered that the sentences should run concurrently, which resulted in the cumulative effect of the sentences it imposed to have been diminished. Regard is made to the fact that if this was not done, the effective term of imprisonment of the applicants would have been as follows:- 1st and 3rd applicants = 29 years; 2nd applicant = 31 years.

[20] Under the circumstances I come the conclusion that the applicants failed to give out a full detailed and satisfactory account of the causes of the delay for bringing the application so late, and further that there are no reasonable prospects that another court might come to a different conclusion than that reached by the trial court.

[21] Consequently the following order is made:-

2.1 The application for condonation of the late filing of the leave to appeal is refused.

2.2 The application for leave to appeal by all the applicants

to the Supreme Court of Appeal is dismissed.

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A M KGOELE
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	MAFIKENG JUSTICE CENTRE
FOR THE RESPONDENT	:	STATE ATTORNEY