THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 714/2017

In the matter between:

JERRY BAFANA PETER MATHIBELA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mathibela v The State* (714/2017) [2017] ZASCA 162 (27 November 2017)

Coram: Shongwe AP, Tshiqi, Majiedt and Mocumie JJA and Tsoka AJA

Heard: 1 November 2017

Delivered: 27 November 2017

Summary: Application for condonation – late filing of and reinstatement of lapsed appeal – inadequacy of explanation - delay unreasonable and would result in inordinate miscarriage of justice - no prospects of success – application dismissed.

ORDER

On appeal from: North West Division, Mahikeng (Garankuwa Circuit Court, Gura J sitting as court of first instance):

The application for condonation and for the reinstatement of the appeal is dismissed.

JUDGMENT

Mocumie JA (Shongwe AP, Tshiqi, Majiedt JJA and Tsoka AJA concurring):

[1] On 14 November 2005 the appellant, Mr Jerry Bafana Peter Mathibela, together with two co-accused were convicted and sentenced in the North West Division, held at the circuit court Garankuwa (court a quo). The appellant was convicted of murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLA) and attempted robbery and was sentenced to a term of life imprisonment for murder and seven years' imprisonment for the attempted robbery respectively. The application for condonation for the late filing of his application for leave to appeal was dismissed by that court. He then petitioned this Court and leave to appeal against his convictions and sentences was granted on 31 August 2016. In terms of rule 7 of the Rules of the Supreme Court of Appeal[1] (the rules) the appellant was required to file a notice of appeal within one month[2], but, this was not done. On 26 June 2017, ten months after the prescribed time frame in the rules, the appellant filed same. On 11 July 2017, eleven months after leave to appeal was granted by this Court, the appellant lodged the appeal record together

[1] Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, 27 November 1998 as amended.

[2] '7.Notice of Appeal. - **(**1) An appellant shall lodge a notice of appeal with the registrar and the registrar of - the court a quo within one month after the date of -
(a) the granting of the judgment or order appealed against where leave to appeal is not required:
(b) the granting of leave to appeal where leave to appeal is required; or . . . .'

with his heads of argument. The appeal record was therefore lodged outside the prescribed period and subsequently the appeal lapsed as set out in rule 8(3) of the rules.[3]

[2] The appellant now applies for his appeal to be reinstated. He has also lodged an application for condonation for the late filing of the notice of appeal, appeal record and heads of argument.

[3] In his explanation for the delay, the appellant stated in his founding affidavit that Ms B Segone of Mahikeng Justice Centre represented him during the trial in the court a quo. Upon the refusal of the court a quo to grant him leave to appeal to either the full court or this Court, he did not get further assistance from Ms Segone. He alleged that he personally petitioned this Court, which petition was before this Court on 20 May 2016. Leave to appeal was granted on 31 August 2016. The appellant submitted further that he only received this court's order on 17 September 2016. According to the appellant between 17 September and December 2016, nearly three months later, he was in continuous communication with Mahikeng Justice Centre to apply for legal assistance. Once more, this allegation is vague and makes no reference to any dates, phone calls or details of the communication between himself and the Justice Centre. According to the appellant, the Mahikeng Justice Centre only granted his application for legal assistance in December 2016. He then consulted for the first time with Mr Gonyane on 17 January 2017 and a second time on 31 January 2017. Therefore the notice of appeal was filed five months later and the record of appeal six months after his first consultation, once more contrary to rule 7 and 8 of the rules.

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[3] '8. Record.—(1) An appellant shall within three months of the lodging of the notice of appeal lodge with the registrar six copies of the record of the proceedings in the court a quo and deliver to each respondent such number of copies as may be considered necessary or as may reasonably be requested by the respondent.

. . . .

(3) If the appellant fails to lodge the record within the prescribed period or within the extended period, the appeal shall lapse.'

[4] The State opposed the application on the basis that there was no satisfactory explanation for the numerous delays on the part of the appellant and that there were no prospects of success. In his opposition, counsel for the State submitted that there were in fact three applications for condonation filed by the appellant. The first application was before the court a quo (dismissed on 4 May 2012), the second application was before this Court, (granted on 31 August 2016) and the third application is the present application for condonation coupled with an application for reinstatement of the appeal. The State argued further that in the first application, the appellant approached the court a quo after a period of seven years and in the second application, the appellant delayed the process by filing his papers ten months after the prescribed period. Counsel for the State urged this Court not to accept the appellant's unreasonable explanation for the delay and numerous incidents of non-compliance with the rules of this Court.

[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*[4]*:*

'[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*,[5] 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[6]. It has been pointed out[7] 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)

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[4] Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited & others, National Director of Public Prosecutions & another v Mulaudzi [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA).

[5] *Rennie v Kamby Farms (Pty) Ltd* 1989(2) SA 124 (A) at 131E.

[6] *Moraliswani v Mamili* 1989 (4) SA 1 **(**A) at 10E.

[7] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* 1985 (4) SA 773 (A) at 789C.

[6] The same principles apply in the context of criminal cases as restated in *Mogorosi v State*[8] 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*[9] 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:

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[8] *Mogorosi v S* (410/2010) [2010] ZASCA 147 (29 November 2010) paras 3-and 8.See also *Mtshali & Others v Buffalo Conservation 97 (Pty) Ltd* (250/2017) [2017] ZSCA 127 (29 September 2017)
[9] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA).

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.'[10]

[9] As was the case in *Mulaudzi*, as is apparrent, the founding affidavit is singularly unhelpful in explaining the long delay.[11] 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.

[10] In a large measure, the State's case rested on circumstantial evidence in so far as the actual shooting was concerned. Mr Keletso Desmond Moletsane (Desmond) testified that he was friends with the appellant and his two co-accused. On this fateful day, he went to the house of accused 2 around 9h00 where he found the three together although accused 3 arrived just after he had arrived. Upon his arrival the decision was taken to buy meat and beer and to have a braai. They all left together in accused 3's vehicle. When they reached the supermarket, only accused 2 and 3 alighted to go and buy meat. He remained in the vehicle with the appellant. When the two co-accused returned, the appellant alighted from the vehicle and spoke to accused 3 outside the vehicle. He then saw accused 3 take out a firearm from the side pocket of the vehicle on the driver's side, and gave it to the appellant. The appellant went back to the supermarket with the firearm and they drove off to park a distance from the supermarket and waited for the appellant. Soon thereafter, the appellant came running towards the parked vehicle with the firearm in his hand and he noticed that his T-shirt was blood stained. The appellant got into the vehicle and accused 3 drove to the house of accused 2 where the appellant changed into a clean T-shirt. They all drove together to Temba Square where they drank beer until late that night. Desmond testified further that he did

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[10] Ibid para 6. See also *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; 2013 (2) All SA 251 (SCA) para 11.
[11] *Mulaudzi fn 2* para 30.

not report this incident to the police as he was afraid of the appellant who told him not say anything about what he had witnessed.

[11] Desmond was a single witness. Section 208 of the Criminal Procedure Act 51 of 1977 (the CPA) provides that a single witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material aspects[12]. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.[13] The correct approach to the application of this so-called 'cautionary rule' was set out by Diemont JA in *S v Sauls & others*[14] as follows:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber 1971 (3) SA 754 (A)*). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.' (See further all the other authorities referred to therein.)[15]

[12] Desmond's state of sobriety and his intermittent lying on the back seat of the vehicle due to a hangover was questioned at length during cross examination. He however did not contradict himself. The court a quo was cognisant of the fact that Desmond was a single witness and approached his evidence with caution as it ought to have. On a conspectus of all the evidence, Desmond could not be discredited. As the trial court correctly found 'he was consistent and firm [in] his account of that day's

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[12] Section 208 of the Criminal Procedure Act 51 of 1977 reads as follows:
Conviction may follow on evidence of single witness
'An accused may be convicted of any offence on the single evidence of any competent witness'.
[13] *S v Webber* 1971 (3) SA 754 (A) at 758G–H.
[14] *S v Sauls & others* 1981 (3) SA 172 (A).
[15] Ibid at 180E–G.

events. He answered questions spontaneously without pondering. . . He narrated most of the events surrounding the visit to the supermarket in the same way as all the accused narrated them.' The reliance of the appellant on Desmond's state of sobriety did not assist him at all as Desmond's observation could not be faulted. It tallied with the events as they unfolded from the time he saw accused 3 giving the appellant the firearm and the appellant returning from the supermarket with the firearm in his hand with blood on his T-shirt. The appellant, on his own version, placed himself on the scene of the crime. From the prevailing circumstances there could be no doubt that the appellant was the person who shot the deceased. There was no other shooting on the day in question.

[13] In this Court, the appellant's counsel argued that the appellant was convicted on the basis of illegally obtained evidence, i.e That two the firearms which were found by the police in the house of accused 2 and pointed out by the appellant, were found without a search warrant. The unrefuted evidence of the police before the trial court was the following: After the three accused were arrested; based on information that the firearms were going to be removed; the three accused were booked out of custody and taken to accused 2's house. Inside the house, the police asked accused 2's permission to search the house and he consented.[16] Once they were inside the house, the appellant pointed the firearms out from behind a unit. The two firearms were confiscated.

[14] These firearms were sent for ballistic examination. In terms of the s 212 statement which was handed in as exhibit D per agreement between the State and the defence, the examination confirmed that the fired cartridge found at the scene of crime was emitted from one of the two firearms. The search was conducted without a search

[16] Section 22 of the Criminal Procedure Act 51 of 1977 provides:
'22 Circumstances in which article may be seized without search warrant
A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-
(a) if the person concerned consents to the search for and the seizure of the article in question, or *if the person who may consent to the search of the container or premises consents to such search* and the seizure of the article in question;

warrant, but with the consent of accused 2 as the owner of the house. In *Gumede v S*[17] this court stated the following:

'[T]he fact that the evidence of a firearm was obtained in that manner [illegally] did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. . . '[18]

[15] From this factual matrix, it is clear that there are no prospects of success on the merits.

[16] In light of the wanton disregard of the rules of this Court by the appellant, coupled with an inadequate explanation of all the delays, and the fact that the appeal has no prospects of success, the application for condonation must fail and the appeal cannot be reinstated.

[17] In the result the following order is made:

The application for condonation and for the reinstatement of the appeal is dismissed.

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BC Mocumie
Judge of Appeal

[17] *Gumede v S* [2016] ZASCA 148; [2016] 4 All SA 692 (SCA); 2017 (1) SACR 253 (SCA) para 32.
[18] Ibid para 32. See also *Sv Dzukuda & others*; *S v Tshilo* 2000 (2) SACR 443 (CC) para 14.

APPEARANCES:

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	Justice Centre, Bloemfontein
For the Respondent:	MJ De Beer
Instructed by:	Director of Public Prosecutions, Mahikeng
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