



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case no: 470/2012
Not Reportable

In the matter between:

THEMBA AARON NKOSI

Appellant

and

THE STATE

Respondent

Neutral citation: *Nkosi v The State* (470/2012) [2013] ZASCA 32 (27 March 2013)

Coram: CACHALIA, MALAN and THERON JJA and
SCHOEMAN and PLASKET AJJA

Heard: 15 March 2013

Delivered 27 March 2013

Summary: Criminal procedure – appeal – appellant dying before
appeal heard – appeal struck off the roll.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mynhardt, Basson and Mavundla JJ sitting as a court of appeal):

(a) The order granted by this court on 15 March 2013 is recalled.

(b) The matter is struck off the roll.

JUDGMENT

THERON JA (CACHALIA and MALAN JJA and SCHOEMAN and PLASKET AJJA concurring):

[1] The appellant stood trial in the North Gauteng High Court sitting at Ermelo on two counts of murder and one count of housebreaking with intent to commit robbery with aggravating circumstances. The appellant pleaded not guilty but was convicted on all three counts on 30 January 1998 and sentenced to an effective term of imprisonment of sixty years. The appellant's appeal to the high court was dismissed. The appellant appealed to this court against his convictions and sentences with the appropriate leave.

[2] At the hearing of the appeal and after having heard counsel representing both parties, the court was of the view that it ought to interfere with the convictions and sentences imposed and that it was in the interests of justice that it direct that the appellant be released from prison immediately. In the circumstances, the following order was granted:

‘The appeal against the convictions and sentences is upheld. The order of the court below is set aside and the following order substituted:

- “1. The appeal against the convictions on two counts of murder and one of housebreaking with intent to commit robbery and robbery with aggravating circumstances is upheld. The convictions and sentences on these counts in the high court are set aside.
2. The appellant is found guilty as an accessory after the fact to the murders of Herman Segemendes Mosenthal Schultz and his wife, Susara Maria Schultz.
3. The appellant is found guilty on the competent verdict of theft for count 3.
4. The appellant is sentenced to five years’ imprisonment as an accessory after the fact to murder, and to two years’ imprisonment for theft. It is ordered that the sentence on the theft count is to run concurrently with the sentence for the conviction as an accessory after the fact to murder. The sentences are ante-dated to 30 January 1998.
5. It is ordered that the appellant, who commenced serving his sentence on 30 January 1998, be released forthwith.”’

[3] It was subsequently brought to our attention that the appellant had passed away during November 2012. This court thus had no jurisdiction to deal with the appeal.¹

[4] The following order is made:

- (a) The order granted by this court on 15 March 2013 is recalled.
- (b) The matter is struck off the roll.

L V THERON
JUDGE OF APPEAL

¹ *S v January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 809g-h.

APPEARANCES

For Appellant:

MK Steenekamp

Instructed by:

Legal Aid SA, Pretoria

Legal Aid SA, Bloemfontein

For Respondent:

GD Baloyi

Instructed by:

Director of Public Prosecutions, Pretoria

Director of Public Prosecutions,

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