

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A687/2009

13 AUGUST 2010

5 DATE:

In the matter between:

THABO THEMBULA

Appellant

and

Respondent

10 **THE STATE**

J U D G M E N T

15 **YEKISO, J:**

With regards to the matter of appeal of the appellant, Thabo Thembula which serves before us, we have already given an indication to both parties that we intend remitting the matter to
20 the court *a quo* for hearing of further evidence. Further evidence that will have to be heard by the court *a quo* is the evidence of a Luyanda, who has been referred to on numerous occasions on the record of the proceedings.

25 Should it transpire on the hearing of evidence of Luyanda that
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further witnesses may have to be called, the appellant will be at liberty to call such further witnesses. So the order we are about to give will, by way of a summary, amount to the setting aside of the conviction and sentence imposed on the appellant
5 and the remittal of the proceedings to the court *a quo* for hearing of further evidence.

Having said that, the order we are about to give is the following, and should the parties desire a written version of
10 this order, they will be at liberty to liaise with my registrar and then the typed version of this order will be made available to the parties. Therefore the order we are about to give is as follows:

15 Having noted on the basis of the record that during the conduct of the defence case in the court *a quo*, an application was made for a postponement of the matter in order that a defence witness in the person of Luyanda be called;

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And having considered that the refusal by the magistrate to allow such a postponement, was irregular;

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And having considered further that the evidence of Luyanda is material in the defence case;

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NOW THEREFORE IT IS ORDERED AS FOLLOWS:

1. The conviction of and the sentence of life imprisonment imposed on the appellant on a charge or rape be and is hereby set aside.
2. The matter is remitted to the regional court, magistrate's court, Wynberg for the hearing of the evidence of Luyanda Zulu together with such other further witnesses which the defence might wish to call arising from the evidence of Luyanda Zulu.
3. Once the evidence of Luyanda Zulu, together with the evidence of such other further witnesses as referred to in paragraph 2 shall have been heard, the matter should thereafter be further dealt with in accordance with justice.
4. It is hereby directed that the proceedings in the court *a quo* be enrolled for a further hearing as contemplated in paragraph 2 hereof on Monday, 20 September 2010 and may further be re-enrolled for hearing on such days thereafter as and when circumstances may require, depending on the availability of the defence witness in the person of

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Luyanda Zulu together with such further witnesses referred to in paragraph 2.

5. In the event of Luyanda Zulu not being unavailable for any reason, the proceedings shall be referred back to this court in order to be dealt with further.

6. The appellant is released on bail in an amount of R1 000,00 (one thousand rand) on condition that the appellant appears at the regional court, Wynberg, on Monday 20 September 2010 or in the event of Luyanda Zulu not being available for any reason until the matter is dealt with by this court.

That is the order we give.



YEKISO, J

BRUSSER, AJ: I agree.



BRUSSER, AJ