

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A304/2014
DPP REF NO: JPV 2007/100

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

[4 December 2018]


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SIGNATURE

In the matter between:

SIVHIDZO, MULALO UNITY

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MUDAU J:

- [1] The appellant, Mrs Sivhidzo and two other co-accused appeared before N Pandya AJ and assessors on 8 August 2008 charged with murder, two counts of robbery with aggravating circumstances, kidnapping as well as malicious damage to property. On 7 December 2010, the appellant, then accused 3, was convicted of murder, kidnapping and malicious damage to property and so were the other two co-accused. In addition, accused 2, Sello, was convicted of robbery with aggravating circumstances. Consequently, the

appellant was sentenced to life imprisonment in respect of the charge of murder, five years and three years direct imprisonment for the kidnapping and malicious damage to property charges respectively. The effective sentence was therefore a life term of imprisonment for the appellant and her co-accused.

- [2] The appellant and her co-accused unsuccessfully applied for leave to appeal against conviction and sentence on 14 March 2011. Subsequently, the appellant petitioned the Supreme Court of Appeal ('SCA') for leave to appeal which was granted on 18 December 2012. In this instance leave to appeal was granted to the full court of this division¹. However, the appeal since then is yet to be prosecuted for reasons that are dealt with below. The issue for determination is whether the appellant has to approach the Supreme Court of Appeal in order to prosecute the appeal or make an application for condonation to the full court at the same time that the appeal is argued on merit.
- [3] Having noted a litany of correspondence from the parties in relation to the dispute regarding the jurisdiction of this court to entertain the appeal, and after proper consideration, on 5 September 2018 the Judge President of this division, Mlambo JP, issued a directive in terms of s 14(1) (a) of the Superior Courts Act 10 of 2013² in which he set out the issue that requires determination by the full court of this division in the following terms:

"2. After due consideration I have decided to enroll the matter before a full court to consider whether the appeal has lapsed and whether the appellant has to approach the Supreme Court of Appeal again or whether this court has jurisdiction to adjudicate the appeal based on the reasons averred on behalf of the appellant.

3. For this leg of the hearing only heads of argument will suffice and it is not necessary to have regard to the voluminous record.

4. I therefore directed as follows:

¹In terms of section 315(5) (b) 'full court' means the court of a provincial division, or the Witwatersrand Local Division (GLD), sitting as a court of appeal and constituted before three judges.

²Section 14(1)(a) of the Superior Courts Act 10 of 2013 provides: "Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine"

4.1 The matter is set down for hearing before the Full court on 19 September 2018. The notice of set down to be issued by the Registrar should specify that the matter is set down to determine the jurisdiction dispute."

- [4] The Judge President also directed that the appellant's heads of argument be filed on or before 11 September 2018 and that those of the respondent be filed by no later than 14 September 2018. However, after considering written submissions by counsel for the appellant regarding his unavailability on 19 September 2018, the Judge President directed that the matter be set down for hearing before the Full Court on 12 November 2018. Heads of argument on behalf of the appellant had to be served on or before 2 November 2018 and on behalf of the respondent on or before 7 November 2018.
- [5] In a written memorandum, counsel for the appellant, Adv Shapiro, explained why the heads of argument were not served on 2 November 2018 as directed, but on 5 November 2018. In a nutshell, he had to read the heads of argument of the respondent that was served before those of the appellant received on 31 October 2018. An attempt to serve directly on the respondent's counsel, Adv Papachristofou by 3:40 PM on 2 November 2018 failed as he could not locate her. This is contrary to the usual practice, according to the respondent, that all services and notices to be served on the respondent must be served on the clerks or administration personnel members in their appeal section and not on state advocates. The failure to serve heads of argument on behalf of the appellant on the required date was not opposed by the respondent and was for that reason condoned.
- [6] Some relevant facts regarding the adjudication of the dispute are as follows. On 9 September 2014, the Registrar of this Court, subsequent to the appellant having been granted leave to appeal on petition, served the relevant court record consisting of 50 volumes albeit incomplete on the respondent. This is approximately 18 months after the Supreme Court of Appeal granted leave to appeal. The appellant was at that stage still represented by legal aid. On 29 July 2016, the appellant's current attorneys including counsel came on record on which occasion "a notice of motion" with attached heads of argument and a condonation application was served on the respondent. As the record was

incomplete, a formal reconstruction process of the record was embarked upon on 16 October 2017 and completed on 27 October 2017. The complete reconstructed record was subsequently served on the respondent on 11 April 2018.

- [7] Rule 49A of the Uniform Rules of the High Court deals with criminal appeals emanating from the lower courts or when a High Court trial judge grants leave to appeal to a full court comprising three judges in terms of section 315(3) of the Criminal Procedure Act No, 51 of 1977(Criminal Procedure Act). Rule 49A prescribes the procedure to be followed with regard to relevant notices and the lodging of the appeal records .The full court serves as a court of appeal for the decisions of a single judge of a provincial or local division, if the latter court grants leave to appeal or the Supreme Court of Appeal on petition is of the opinion that the questions of law and of fact relating to the appeal do not deserve the attention of the Supreme Court of Appeal. The decision of the majority of the judges hearing the application for leave to appeal in terms of section 17(2)(b) of the Superior Courts Act is final unless the President of the Supreme Court of Appeal acting in terms of section 17(2)(f) refers the matter for reconsideration in exceptional circumstances.

- [8] The statutory provision which deals with the preparation and lodging of the record of proceedings in a criminal trial conducted by a Judge of the High Court in the event of an appeal is section 316 of the Criminal Procedure Act which provides :

“7(a) If an application under subsection (1) for leave to appeal is granted and the appeal is not under section 315 (3) to be heard by the full court of the High Court from which the appeal is made, the registrar of the court granting such application shall cause notice to be given accordingly to the registrar of the Supreme Court of Appeal without delay, and shall cause to be transmitted to the said registrar a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the Supreme Court of Appeal may nevertheless call for the production of the whole record.’ (Own emphasis)

- (b) If an application under subsection (1) for leave to appeal is granted and the appeal is under section 315 (3) to be heard by the full court of the High Court from which the appeal is made, the registrar shall without delay prepare a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be prepared of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the full court of the High Court concerned may nevertheless call for the production of the whole record.' In terms of section 316(7)(b) of the CPA the duty is placed on the registrar of the High Court and, not the appellant, to ensure that the record is made available in this case, to the full bench of the High Court." (my emphasis)

[9] Similarly, rule 49A(1)(b) of the Uniform Rules of Court provides:

"In the case of an appeal in terms of section 315 (3) of the Criminal Procedure Act 51 of 1977 to the full court, the registrar shall, subject to the provisions of section 316 (5) (b) of the said Act, prepare three additional copies of the case record or parts thereof, as the case may be, and shall furnish the State with the number it requires and, on payment of the prescribed fee, shall furnish the appellant with the number he or she requires: Provided that if the registrar is of the opinion that the appellant is too poor to pay the prescribed fee, such copies may be furnished without payment of any fee, in which case the registrar's decision shall be final' (own emphasis)."

[10] In the heads of argument filed on behalf of the appellant, it is contended that "the lateness should accordingly be condoned as there is no moral, factual or legal fault on the part of the applicant". Counsel for the appellant primarily deals with the merits of the condonation application which is beyond the directives issued by the Judge President regarding this matter. In argument before us it was, however, contended on behalf of the appellant that the issue of condonation can be dealt with when the appeal is argued on merit and that Rule 8 of the Supreme Court Appeal Rules finds no application.

[11] It was contended by counsel on behalf of the respondent that, with the appeal having lapsed in terms of Rule 8 of the Supreme Court of Appeal Rules, the appellant is obliged to lodge a substantive application to reinstate the appeal and apply for condonation for the late filing of the court record, heads of argument and to explain the failure to file the notice of appeal as required in terms of the applicable rule 12 of the Supreme Court of Appeals Rules. In other words, counsel for the respondent argued that the appellant must

approach the Supreme Court of Appeal because it is the court that granted her leave to appeal to the full court of this division. The respondent contended that this court has no jurisdiction to entertain the condonation application but only the Supreme Court Appeal.

[12] Counsel for the respondent also contended that the Uniform Rules of the High Court do not deal with criminal appeals referred to the full court by the Supreme Court of Appeal. Instead, the Uniform Rules of the High Court deals with appeals from the lower courts or when leave to appeal has been granted to the full court. In as much as this court has inherent jurisdiction to regulate its own proceedings, the respondent argued, “such a power only becomes operational and effective once jurisdiction has been established” which it does not have in this instance. In as much as the Supreme Court of Appeal Rules are applicable, so it was argued; the Uniform Rules of the High Court also find application. The respondent contended, that a full court can entertain a condonation application and reinstatement of an appeal the same day the appeal is scheduled to be heard, only in circumstances where an application for leave to appeal is granted by a High Court trial judge to a full court in terms of section 315(3) of the Criminal Procedure Act.

[13] The argument by the respondent’s counsel is unconvincing. In any event, counsel conceded that there are no reported cases in point, in which the contentions made in support of the respondent have been dealt with by our courts. I am not aware of any. By way of analogy to the contrary, in *Erasmus v ABSA Bank Ltd and Others*³, the full court dealt with the issue of condonation of a lapsed appeal due to noncompliance with uniform rules 49(6)(a), 49(7)(a) and 49(13)(a). The appeal was pursuant to a petition filed with the Supreme Court of Appeal which granted leave to the full court of the Gauteng Division of the High Court. The full court entertained the matter but dismissed the application for condonation. Importantly, the matter was not referred back to the Supreme Court of Appeal to consider the condonation application. Neither was the Supreme Court of Appeal Rules applied in considering the condonation application.

³ (A982/13) [2017] ZAGPPHC 890 (8 December 2017). This is a judgment by Potterill J (with Hughes and Mphahlele JJ concurring).

[14] There is no doubt that there has been a significant delay in the prosecution of the appellant's appeal in this matter. From a proper reading of the heads of argument and consideration of the submissions made on behalf of the parties, the delay cannot be laid at the door of the appellant alone. In this case the voluminous record of the trial proceedings in respect of certain parts, was reconstructed fairly recently. Ideally, an appeal should be heard within a reasonable period of time after leave to appeal has been granted failing which an appellant could be prejudiced in circumstances where the appeal is upheld.

[15] Whether condonation should be granted for this and other reasons is for the court seized with the condonation application to grapple with. In considering an application for condonation a court must take into account a number of considerations. These include the degree of non-compliance, the explanation thereof, the importance of the case, the prospects of success, the respondent's interests in the finality of the matter and the administration of justice (*S v Mantsha*⁴; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others*⁵; *Federated Employers Fire & General Insurance Company Limited & another v McKenzie*⁶; *Uitenhage Transitional Local Council v South African Revenue Service*⁷; *Commissioner for Inland Revenue v Burger*⁸; *Miles Plant Hire v Commissioner SARS*⁹). It is clear however, that from a proper reading of section 316 referred to above, the responsibility of ensuring that a complete record is launched with a court of appeal lies with the registrar, and not the appellant.

[16] In *S v Ramulifho*¹⁰ the Supreme Court of Appeal expressed its concern by the failure of the various role players at various stages of the appeal process as a result of which the appellant spent 12 years for his appeal to be heard. At para [17] of the judgment the Supreme Court of Appeal put it thus: 'the judicial officer and every other official involved in the legal process whereby a person is deprived of

⁴ 2009 (1) SACR 414 (SCA) at 419 para 11.

⁵ [2013] ZASCA 5; 2013 2 All SA 251 (SCA) paras 11–13.

⁶ 1969 (3) SA 360 (A) at 362F-G.

⁷ 2004 (1) SA 292 (SCA).

⁸ 1956 (4) SA 446 (A) at 449 G-H.

⁹ (20430/2014 [2015] ZASCA 98 (1 June 2015)).

¹⁰ 2013 (1) SACR 388 (SCA) at para 17.

his freedom are obliged to ensure that the process obtains the full stamp of approval of the law as quickly as possible, and the impression must never be created that our courts and judicial officials are in different to the freedom of the individual'.

[17] The Supreme Court of Appeal has often expressed its displeasure about the unnecessary clogging of the Supreme Court of Appeal with matters and in particular where there are no considerations that call for the attention of the Supreme Court of Appeal (*S v Myaka*¹¹). In terms of section 35 (3) (o) of the Constitution every accused person has the right to have recourse by way of appeal or review to a higher court than the court of first instance. The right to appeal is one of the most fundamental rights in our Bill of Rights. In as much as rule 49A is silent with regards to referral of appeal matters by the Supreme Court of Appeal to a full court, in my view, the hearing of a condonation application by the full court enhances an accused's protected right to have recourse by way of appeal.

[18] What is clearer is that section 316 of the Criminal Procedure Act and rule 49A of the Uniform Rules of the High Court contain no equivalent of rule 8(3) of the Supreme Court of Appeal Rules which brings about the lapse of an appeal on failure to lodge the record within the prescribed period. In my view, this matter is peculiar in that, although leave to appeal was granted by the Supreme Court of Appeal, the appeal is before the full bench of the High Court. Rule 8 of the Supreme Court of Appeal Rules would have been applicable if the appeal was to be heard by the Supreme Court of Appeal. Put simply, the appeal would have been regarded as having lapsed in terms of rule 8(3) of the Supreme Court of Appeal Rules if the appeal was pending before the Supreme Court of Appeal (See *Sayed and Others v S*¹²; *Mathibela v S*¹³; *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi*¹⁴).

¹¹ 1993 (2) SACR 660 (A) at 662b.

¹² 2018 (1) SACR 185 (SCA).

¹³ (714/2017) [2017] ZASCA 162 (27 November 2017).

¹⁴ 2017 (6) SA 90 (SCA)).

- [19] Furthermore, section 171 of the Constitution of the Republic of South Africa, 1996 (Constitution) provides all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation. In other words, the rules prescribed for the functioning and regulating of courts must be sourced from national legislation. In addition, this means that the Constitution enables courts to make rules for their proper functioning and regulation of process.
- [20] In this regard, section 30(1) of the Superior Courts Act provides that rules for the Supreme Court of Appeal, High Court and Magistrates' Court are made in terms of the Rules Board for Courts of Law Act 107 of 1985 (Rules Board for Courts of Law Act). Rules Board for Courts of Law Act make provision for the establishment of the Rules Board for Courts of Law, which has the powers and duties conferred or imposed upon it by the Rules Board for Courts of Law Act. In terms of section 6(2)(a) the Rules Board for Courts of Law has the power to make different rules for the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts and in respect of different kinds of proceedings. The rules are intended for the efficient and expeditious administration of justice. Accordingly, each of these courts has rules that regulate their own proceedings. Each of these courts is not obliged to apply the rules made for the purposes of regulating the processes of other courts. The contention by counsel on behalf of the respondent that the Supreme Court of Appeal Rules applies to this matter therefore is without basis and is likely to impede the proper and efficient administration of justice by unnecessary delays.
- [21] In conclusion, it is my view that the full court is not obliged to apply rule 8(3) of the Supreme Court of Appeal Rules. There is no plausible reason why there should be differences in approach in relation to a full court having the powers to deal with condonation in matters referred to it for adjudication of an appeal by a single judge of the High court, and those referred by the Supreme Court of Appeal. However, in dealing with the appellant's delay to prosecute her case, in my view, the full court must invoke its discretion, taking into consideration all the circumstances relating to the failure by the appellant to prosecute the appeal within a reasonable period, to decide whether it

condones the delay or not. In any event, there can be no question of prejudice against the respondent since the outcome can always be challenged on further appeal to the Supreme Court of Appeal. Importantly, as indicated above the Supreme Court of Appeal is *functus officio* in as far as it has already made its decision in referring the appeal to the full court.

[22] Order

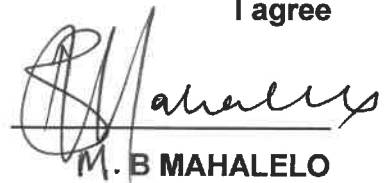
[22.1] The matter is referred to the full court to consider whether the appeal has lapsed, and if not, to adjudicate the appeal.



T P MUDAU

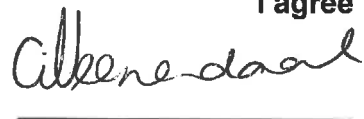
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree



[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree



C VAN VEENENDAAL

[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Hearing: 12 November 2018

Date of Judgment: November 2018

APPEARANCES

For the Applicant: Adv Shapiro

Instructed by: S Shapiro Attorneys

For the Respondent: Adv M Papachristoforou

Instructed by: Director of Public Prosecutions
Johannesburg