

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: K/S 30/1999
Heard on: 10/11/2016
Delivered on :25/11/2016

In the matter between:

PATRICK JOB

Applicant

And

THE STATE

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J

- [1] The applicant, Mr Patrick Job, is an offender serving 33 years imprisonment at the Tswelopele Correctional Centre, Kimberley. He was convicted on 15 October 1999 on a charge of murder, a second charge of unlawful possession of a firearm and the third of unlawful possession of

ammunition. He was sentenced by the retired Judge of this Division, Van der Walt J, on 18 October 1999 to an effective 33 year term of imprisonment. On the charge of murder he was sentenced to 30 years imprisonment. The charges of unlawful possession of a firearm and ammunition were taken together for purposes of sentence and a three year term was imposed. This application for leave to appeal, unusually, therefore calls for some elaboration.

- [2] The Court expressed itself as follows in meeting out the sentence:

“Ek sal ook versoek dat hy nie vir parool oorweeg word voor hy nie ten minste 25 jaar gevangenisstraf uitgedien het nie.”

The applicant seeks leave to appeal against the sentence but limited to the non-parole period of 25 years, to the Full Bench of the Northern Cape Division. He further seeks condonation for the late filing of his application for leave to appeal.

Condonation

- [3] It is common cause that the application for condonation is 17 years late. However, the Supreme Court of Appeal has authoritatively pronounced in ***Melanie v Santam Insurance Co. Ltd*** 1962 (4) SA 531 (A) at 532B – E:
- “In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to*

*formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or **the importance of the issue and strong prospects of success may tend to compensate for a long delay.** (Own emphasis). See also **S v Van der Westhuizen 2009 (2) SACR 350 (SCA)** at 353c-d (para 4).*

- [4] Counsel for the respondent, Ms Ilanga, opposed the granting of the condonation contending that the delay was wanton and the explanation given by the applicant was inadequate. In **S v Mantsha 2009 (1) SACR 414 (SCA)** at 419e – h (para 12) Jafta JA stated:

*“.....The error pointed out by the attorney does not affect the inadequacy of the explanation given for the delay. Even if the step taken by the appellant in instructing Mr Fortuin is discounted from the period of four years, there remains a period of three and half years for which there was no explanation furnished. Where non-compliance with the rules is time-related, the explanation must cover the entire period. In **Uitenhage Transitional Local Council v SA Revenue Service**, Heher JA repeated the admonition previously issued to practitioners who bring applications such as the present. He 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 to 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 their 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.’”

[5] The applicant raised the following reasons for the delay:

5.1 On 09 February 2000 state counsel, Adv W Shiburi, issued a notice of intention to have the matter struck off the roll in terms of Rule 49(3) of the Superior Court Rules on 29 February 2000 on the grounds of non-compliance with the Rules or failure to prosecute his appeal;

5.2 On 25 May 2000 the Registrar of this Court addressed a letter to the Head of Prison, Kimberley, informing him that the appeal served before Van der Walt J at which hearing the applicant was legally represented by Adv M Muhlohlonyi. The record was incomplete and Van der Walt J struck the matter from the roll;

5.3 On 03 November 2000 a letter was addressed to the Registrar by Tobie Kotze Bergh & De Beer Inc on instructions of the Legal Aid Board, Upington, requesting a merit report in order to advise the LAB on prospects of success on appeal. The applicant maintained that he had already applied twice for Legal Aid representation and in addition, was interviewed by a certain Mr Bergh of Kotze Bergh & De Beer Inc in March 2001 but nothing positive came out of that interview. A second application was launched in 2002 for legal aid representation to no avail. He had, at the stage of writing this letter, served three and half years of his sentence already.

5.4 The applicant was incarcerated in Mangaung Maximum Security Prison when he addressed an undated letter to the Supreme Court of Appeal, probably around June 2003, using the High Court Kimberley postal address. The letter was received by the Office of the Director Public Prosecutions (DPP), Kimberley, on 23 June 2003. The request was aimed at the intervention of the DPP to help him get a Legal Aid attorney.

5.5 On 05 December 2003 the Kimberley Justice Centre (alias LAB) furnished the Registrar with a list of all the offenders or inmates who had applied for legal assistance in their applications for leave to appeal. Their applications, which included the applicant's, were declined. The reasons for denying the application were not stated on the document. The applicant states that he wrote to the Registrar in December 2003 after being denied legal assistance but no response was forthcoming from the Registrar's office. He insisted that the Registrar sets down his application for leave to appeal and furnish him with the date of the hearing.

5.6 On 12 January 2004 the applicant wrote another letter to the Registrar stating that the Kimberley Justice Centre has denied him legal assistance and opted to pursue the application for leave to appeal in person.

5.7 On 16 March 2004 the applicant wrote a letter to the Registrar and informed him that the Kimberley Justice Centre informed him that his application for legal assistance is already more than 6 months late but he was at liberty to continue with the process in person. I have established that the LAB's policy at the time, rightly or wrongly, was

not to render assistance if an indigent applicant approached them only after six months of a judgment having been delivered. Happily, those days are gone.

5.8 In a letter dated 21 June 2004 addressed to the Judge President, Northern Cape Division, he alleged that he lodged an appeal on 18 October 1999, within the 14 days of his conviction and sentence which he claims was granted but was struck off the roll. He experienced problems with the Legal Aid Board.

- [6] The Judge President delegated the Assistant Registrar, Mr Brand, to deal with the complaint. The latter wrote a letter dated 25 June 2004 to the applicant and informed him that his application will be allocated a date of hearing which will be communicated to him in due course.
- [7] A complaint for undue delay for the prosecution of the appeal was lodged with the Office of the Public Protector who in turn addressed a letter dated 24 January 2005 to the Registrar of this Court. The Registrar informed the Office of the Public Protector that the appeal was set down for Wednesday 23 February 2005 at 10h00. There is further a note addressed to the Head of Prison which stated that the appeal was set down for 03 March 2005 at 09h00.
- [8] On 17 June 2010 the Registrar issued a notice that the application for leave to appeal was set down for Friday 03 September 2010 at 09h00. A copy was served on the DPP and Kimberley Justice Centre. Copies of the judgment on sentence and the applicant's papers were attached. Majiedt AJP brought the hearing forward to 02 September 2010 at 09:00. The application, at which the applicant was apparently represented by Mr L

Setouto of the Kimberley Justice Centre, was struck off the roll for failure to lodge an application for condonation.

- [9] The said Mr Setouto addressed a letter on 02 September 2010 to Mangaung Correctional Services under the heading: **RE APPLICATION FOR LEAVE TO APPEAL. KS 30/99 (PATRICK JOB)** which reads:

“Kindly take note that your application for leave to appeal was heard today 2nd September 2010. However your application was removed from the roll. This means that you can still bring the application.

The problem the court had was that you did not provide enough reasons why it took almost 11 years before you [brought] the application for leave to appeal.

Should we not receive any response by the 2nd October 2010 we will assume that you do not want to continue with the application and your file will be closed.”

- [10] This was not good enough because Mr Setouto should have drafted the papers for condonation on his behalf. Subsequent to the matter being struck from the roll in 2010 there was no further communication. It is not known whether this last letter from the Justice Centre even reached the applicant or not.

- [11] The applicant clearly never abandoned his intention to have the decree by Van der Walt J set aside that he serves at least 25 years of his effective 33 year sentence before he is considered for parole. It is therefore for the aforementioned reasons that I deem it equitable and fair that the applicant should succeed with the condonation application, irrespective of the

merits or demerits. The delay was systemic and institutionally based over which the applicant had very little control.

The non-parole recommendation: What are applicant's prospects.

- [12] In as far as the non-parole recommendation is concerned Ms Ilanga argued that the applicant committed the offences on 24 December 1997 before s 276B(1) of Act 51 of 1977 (the CPA) came into operation on 01 October 2004, and that since the said section has no retrospective operation it finds no application in this matter. This section provides:

“(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

*(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.”*¹

- [13] Harms JA dealt with the suitability of a non-parole period in **Mhlakaza & Another** [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) AT 521d – f as follows:

“The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served..... The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the judiciary.”

¹ Inserted by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997, promulgated on 12 December 1997 but only put into operation on 01 October 2004.

[14] In ***S v Stander*** 2012 (1) SACR 537 (SCA) paras 12 and 16 Snyders JA pronounced:

“[12] Despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power.

[16] ...An order in terms of s 276B should therefore only be made in exceptional circumstances, when there are before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole.”

[15] In any event, as the State also correctly conceded, s 276B of the CPA only came into effect on 01 October 2004; long after the applicant was sentenced. The applicant may have been unfairly treated in that:

15.1 A prisoner sentenced to life imprisonment before 01 October 2004 could be considered for parole after serving 20 years.

15.2 After 01 October 2004 a prisoner serving a life sentence is eligible to be considered for release on parole after serving 25 years.

Therefore without Van der Walt J’s decree the applicant may have been considered for parole already, taking into account the remission of sentence through a presidential amnesty etc. See ***Van Vuuren v Minister of Correctional Services and Others*** 2012 (1) SACR 103 (CC); ***S v Mthinkhulu*** 2013 (2) SACR 89 (SCA).

[16] In ***Jimmale and Another v S*** [2016] ZACC 27 Nkabinde J writing for the unanimous court instructively pronounced:

“[16] The Court remarked further that ‘the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of

sentence.’ It endorsed Pauls [S v Pauls 2011 (2) SACR 417 (ECG)], and said that exceptional circumstances cannot be spelled out in advance in general terms, but should be determined on the facts of each case. The Court said that there ‘should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist.’ The Supreme Court of Appeal said that two issues arise when a court considers imposing a non-parole period:

‘First, whether to impose such an order and, second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes a misdirection.’

[17] In my view, there are reasonable prospects of success on appeal regard being had to the instructive remarks by the Supreme Court of Appeal and the Constitutional Court in the aforementioned judgments. There is also no reason why condonation should fail since strong prospects of success tend to compensate for the long delay.

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

- 1. Condonation for the late filing of the application for leave to appeal is granted.**
- 2. The applicant is granted leave to appeal to the Full Bench of this Division, limited to the order by Van der Walt J relating to the non-parole period of 25 years before he could be considered for parole.**
- 3. It is ordered that the Kimberley Justice Centre must serve the Notice of Appeal on the Registrar of this Court and the Office of**

the Director of Public Prosecutions (DPP) not later than 30 January 2017.

- 4. The DPP must then issue the required Notices not later than 13 February 2017 after consultation with the Judge President for a date of hearing.**

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the applicant: Adv V.Z Nel

Instructed by: Legal-Aid SA

Kimberley Justice Centre

For the respondent: Adv KF Ilanga

Instructed by: Office of the Director Public Prosecutions

Kimberley