

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 100/2008

In the matter between:

THE DIRECTOR: PUBLIC PROSECUTIONS,
FREE STATE

Applicant

And

SIBUSISO MSIMANGO

1st Respondent
and 16 other respondents

HEARD ON: 31 JANUARY 2015

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 MARCH 2015

INTRODUCTION

- [1] Two applications for leave to appeal have been filed in this matter, one by the Director of Public Prosecutions, Free State (“the DPP”) and the other by Mr Sibusiso Msimango and his former co-accused to whom I shall refer hereinlater as “Msimango *et al*” to avoid confusion.
- [2] The DPP’s application for leave to appeal was filed on 31 October 2014 and well within the applicable timeframe. It gave notice of

its intention to apply for leave to appeal on 12 December 2014, being the last Friday of the fourth term in 2014. This date was not arranged with me and did not suit me as I was allocated a criminal trial to be heard in the circuit court in Harrismith during the final two weeks of that term. I indicated to Adv Pretorius of the DPP's office that another date had to be arranged during the first term of 2015.

- [3] Co-incidentally, and whilst I was on circuit duty, Msimango *et al*/ filed a notice of opposition on 5 December 2014 only and on 12 December 2014 their application for leave to appeal. This was done well outside the applicable timeframe. Although this application appears to be brought by all seventeen convicted persons, only ten supporting affidavits accompanied the application for condonation which was filed simultaneously. Incidentally, the ten persons who made confirmatory affidavits are all serving sentences of imprisonment. These persons are the 1st, 3rd, 4th, 7th, 8th, 11th, 12th, 13th, 14th and 15th respondents as cited by the DPP in its application and they were also arraigned as accused in the same order. The others did not depose to any confirmatory affidavits.

II THE HEARING OF THE APPLICATIONS FOR LEAVE TO APPEAL

- [4] A date for hearing of the applications was agreed upon and the applications were eventually heard on 31 January 2015.

- [5] Adv Johann Nel, who initially appeared for the defence during the trial and again at the sentencing stage, argued the application for leave to appeal on behalf of Msimango *et al*. Adv Pretorius who throughout the trial appeared for the DPP represented it again.
- [6] Adv Pretorius submitted that, without conceding that the merits favoured Msimango *et al*, the application for condonation should be granted whereupon I granted condonation for the late filing of the application for leave to appeal.

III **EVALUATION OF THE APPLICATIONS**

- [7] The DPP's application for leave to appeal, being first in time, shall be considered first.
- [8] I am satisfied that there is no reasonable possibility that another court may find that Messrs Sylvester Mahamo, Sicelosekosi Clever Mthimkulu and Adoons Knight @ Promise Beta, cited as 5th, 6th and 9th respondents in the DPP's application (also accused 5, 6 and 9 in the trial) were sentenced too lenient or that I made any misdirections in this regard. 5th and 9th respondents, being Zimbabwe citizens, were incarcerated since 23 August 2006 awaiting trial as their bail applications were refused. 6th respondent was also arrested on 23 August 2006 and bail was initially refused insofar as he failed to prove that he was a South African citizen. Such proof was obtained eventually at a late stage and when my attention was drawn to this, I immediately released him on bail just before the finalisation of the trial. All

three were therefore in custody awaiting trial for 8 years. Their incarceration was one of the reasons that I insisted throughout the trial that started as long ago as June 2012 that unnecessary delays should be avoided as far as possible. The record will reflect how many times I raised this issue. The longer the trial would run, the more unfair would it be for them. The other respondents apparently did not care too much about their predicament.

- [9] Adv Pretorius submitted that I erred in sentencing these three respondents in terms of section 284 of the Criminal Procedure Act, 51 of 1977 (“the CPA”) to be detained until the rising of the court. According to his argument I should have at best for them sentenced them to a period of imprisonment, wholly or partially suspended. 5th, 6th and 9th respondents did not play meaningless rolls in the activities of the Msimango syndicate, but bearing in mind their relatively minor involvement I would not have sentenced them to a period in excess of five years’ imprisonment if they were out on bail all the time. I was of the opinion that they had served their time and that it would be inappropriate to sentence them to any term of imprisonment, even if the imprisonment was wholly or partially suspended. It was proved that 5th and 6th respondents were involved with the syndicate’s activities on the farm Annasvlei, district Wesselsbron during the middle of 2006 and that 9th respondent was involved there as well and also before that on Plot L17, Virginia. All three are apparently poor people with meagre means. They were conveniently used by the leaders of the syndicate, probably

without being paid enormous amounts. Unlike most of the other respondents, they did not even operate bank accounts and most certainly do not possess luxury items such as houses and motor vehicles.

- [10] No specific mention is made of the sentences imposed on 10th, 16th, 17th and 18th respondents in the DPP's application. In my view the DPP has not convinced me that a reasonable possibility exists that another court may find that their sentences were too lenient or that I misdirected myself in imposing the particular sentences.
- [11] I took into consideration that 11th respondent was a security guard with Protea Coin Security at the Harmony One Plant and that 12th and 13th respondents were mine employees at the Harmony One Plant although I did not mention this specifically when sentences were imposed. The reader is referred to my findings in the judgment delivered on 9 to 12 September 2014. This was surely an aggravating factor that I regarded in a serious light. However the proven role that these three respondents played was limited. They have not been involved over any extended period of time according to the proven facts. They were involved during the latter part of 2007 only and in respect of isolated incidents relating to the farms Memoriam, district Ventersburg and/or Mocca, district Hennenman. In my view there is no reasonable possibility that another court may find, based on the proven facts, that they deserved more severe sentences.

- [12] The position of 1st, 3rd and 4th respondents – the Msimango’s – and 7th, 8th, 14th and 15th respondents, the Sithole’s – is totally different from the others mentioned above. I am of the view that I felt overcome with mercy and compassion when I sentenced them, especially 1st, 3rd and 4th respondents, in light of the confiscation orders issued in terms of the Prevention of Organised Crime Act, No. 121 of 1998 (“POCA”), a few days earlier. I accept that another court may find that I either misdirected myself, or that the sentences were too lenient and that interference is warranted. Adv Pretorius submitted during argument at the sentencing stage that all the sentences in respect of all accused persons should run concurrently, but argued that 25 years in respect of the Msimangos and 20 years in respect of the Sitholes would be appropriate effective sentences.
- [13] Having considered the matter afresh, I am of the view that there is a reasonable possibility that another court may find that I erred and impose more severe sentences.
- [14] Adv Nel submitted that, should leave to appeal be granted in respect of the application of Msimango *et al*, it should be to the Supreme Court of Appeal and not the full bench of this division as set out in the application for leave to appeal, bearing in mind applicable legal principles. Msimango *et al*’s application for leave to appeal is based on certain grounds of appeal which I conveniently summarise as follows:

1. That I misdirected myself when I applied the provisions of section 342(A) of the CPA and that I in the process failed to assist Msimango *et al* who were unrepresented at the time by explaining the provisions of the relevant subsections to them and incorrectly found that exceptional circumstances existed as contemplated in section 342(A)(4).
2. That I failed to properly exercise my discretion whether or not to grant a postponement.
3. That I misdirected myself in finding and/or intimating that Msimango *et al* (and their legal team) employed delaying tactics.
4. I erred in failing to consider the reason why Msimango *et al* did not cross-examine the last State witnesses.
5. That my rulings and decisions regarding postponements resulted in an unfair trial.

[15] I could not find any authorities in terms whereof the provisions of section 342(A) were utilised in order to close an accused's case. Adv Pretorius could not direct me to any authorities in this regard as well. I dealt with all relevant case law in my judgment and I am satisfied that I ensured that a proper procedure was followed before this section was relied upon, that Msimango *et al* were fully aware of their obligations, the consequences of their actions or inaction and that there were exceptional circumstances in terms whereof I was entitled to act as I did. The record of over six thousand pages speaks for itself and I do not intend to repeat anything. My judgment consists of 293 pages and I dealt with the application in terms of section 342A from pages 160 to 182. I did

my utmost to ensure that the accused persons understand and appreciate the seriousness of the matter. I referred to the right to a fair trial in my judgment with reference to authorities, but the reader is also referred to the Shaik judgment of the Constitutional Court quoted later herein. On 28 July 2014 and weeks before my ruling *Msimango et al* sought a postponement till February 2015. The suggestion was then that the trial should not run and be finished as I directed earlier, but that we proceed on a “stop, start” basis as the record clearly reflects.

- [16] *Msimango et al* from the onset wanted to dictate the pace of litigation. I have explained this in detail in my ruling in terms of section 342(A) as well as in other parts of the judgment. Examples are abundant. It is unnecessary to deal with any again. It is sufficient to state for purposes hereof that *Msimango et al* finally sought a postponement in July 2014 to February 2015 in order to obtain the services of their erstwhile legal team, Mr Schoeman and Adv Nel. At that stage they conceded that the advocate and attorney were not properly instructed, that they did not have sufficient funds to cover their fees and expenses, but that the legal representatives would be prepared to keep their diaries open notwithstanding lack of assurances pertaining to payment of their fees and expenses. This appeared to be highly improbable. Neither the attorney, nor counsel approached the prosecutor or the court at any stage to confirm the instructions, their availability and preparedness to come on record on that basis. This must be seen in the light of the fact that I indicated already in August 2013 that the matter would be postponed to

2014 on the basis that the trial should run without further postponements.

- [17] Msimango *et al* wanted to dictate to the court that once we proceed with trial in February 2015 (if at all, bearing in mind the unwillingness of the legal representatives to show up at court and confirm the alleged agreement), the court should sit for two weeks and the hearing then to be postponed for three months to enable them to go back to their employment, then to sit for another two weeks and so on. I am not prepared to accept that any court acting reasonably would be prepared to agree to such a suggestion.
- [18] Regarding delaying tactics employed by Msimango *et al*, I have to do nothing more than to refer to the full record together with my judgment on the merits and ruling in terms of section 342(A).
- [19] It is correct that the last state witnesses were not cross-examined and that the investigating officer was not cross-examined fully. Msimango *et al* did not testify in their defence. They also did not present any arguments on the merits as to why they should be acquitted. I am of the view that the respondents were given sufficient opportunity and time and that they should not be heard to cry foul at this stage of the proceedings.
- [20] All remarks made by me quoted in the application for leave to appeal must be read in context, having regard to the full record of the case, and when this is done, I am of the view that no

reasonable possibility exists that another court may come to the conclusion that Msimango *et al* did not have a fair trial. That right was described in **S v Shaik** 2008 (2) SA 208 (CC) at para [43] in these terms:

‘The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one - way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires “fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.”’

[21] In conclusion I am not convinced that there is a reasonable possibility that another court may come to a different conclusion and the application of Msimano *et al* should be refused.

IV THE ORDERS

[22] Accordingly the following orders are made:

1. The Msimango *et al* application for leave to appeal against their convictions is dismissed.
2. The DPP’s application for leave to appeal against the sentences imposed on 17 October 2014 is granted partially insofar as leave is granted to the Supreme Court of Appeal in respect of the sentences imposed on 1st, 3rd, 4th, 7th, 8th, 14th

and 15th respondents, but leave to appeal is denied in respect of the sentences imposed on the remainder of the respondents.

J. P. DAFFUE, J

On behalf of the applicant:	Adv D Pretorius Instructed by: Director: Public Prosecutions BLOEMFONTEIN
On behalf of the respondents:	Adv J Nel Instructed by: Bertus Jacobs Inc BLOEMFONTEIN