

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE PROVINCIAL DIVISION)**

***KIMBERLEY
CASE NO.:CA&R 35/01
DATE: 24/08/2001***

In the matter between:

ANDREW ITUMELENG BABEILE

APPLICANT

and

THE STATE

RESPONDENT

CORAM: Steenkamp J.P et Majiedt J

***Judgment on Application for
leave to appeal***

MAJIEDT J:

1. The Applicant seeks leave to appeal against our dismissal of his appeal against conviction. By reason of the fact that the application had been lodged out of time, the Applicant also seeks condonation for his non-compliance with the Rules of Court.
2. In considering the application for condonation, we are

enjoined to have regard to:

- 2.1 the degree of the lateness of the filing of the application and the explanation therefor; and
- 2.2 the prospects of success and the importance of the case.

See: *S v di Blasi* 1996(1) SACR 1(A) at 3f-h.

***S v Mohlathe* 2000(2) SACR 530 (SCA) at 535g-536a.**

In my view, the Applicant has cleared the first hurdle in that he has to my mind, furnished a satisfactory explanation (i.e. impecuniosity) for the non-compliance.

What remains to be considered is the second leg, viz. prospects of success.

- 2. In considering the merits of the application for leave to appeal, I am mindful of the need to disabuse one's own mind of the fact that we, as a Court of Appeal, were not persuaded that the Magistrate had been wrong in his decision to convict the Applicant of attempted murder.

See: *R v Kuzwayo* 1949(3) SA 761(A) at 766.

The other side of the coin is, however, equally apposite given the facts of this case, viz. that it is totally unacceptable to grant leave to appeal in order to provide comfort to the

Applicant with the knowledge that the Supreme Court of Appeal will furnish a final decision in his case;

See: *S v Swanepoel* 1978(2) SA 410(A) at 411F-G.

4. The appeal before us entailed conviction only and was furthermore limited to the question as to whether the Applicant had been correctly convicted of attempted murder. The facts of the case appear fully in our judgment on appeal and it is not necessary to repeat same for purposes of this judgment.
5. **The written application sought leave to appeal against the decision on the Applicant's petition to grant leave to appeal to this Court on the narrow ground (enunciated in paragraph 4, *supra*) only and, in the alternative, against our dismissal of the appeal. Mr. Botha who appears for the Applicant, expressly abandoned the first leg of the application and argued only the latter (as he did in his written Heads of Argument). We are concerned therefore only with the merits of an application for leave to appeal against the dismissal of the Applicant's appeal.**
6. Mr. Botha has, as I understand his argument, really only two strings to his bow in his quest for leave to appeal, i.e:

6(1) firstly he submits that there is reasonable doubt that the Applicant had intended to kill the complainant, given the fact that the attack on the complainant had not been premeditated and that a pair of scissors had been used; and

6(2) that, since the complainant had, according to his testimony, ducked at the time when he saw the Applicant stabbing at him, there was reasonable doubt as to an intent to kill.

7. Before I deal with these submissions, I need to record the following: -

7.1 Mr. Botha unhesitatingly conceded (as did his predecessor, Mr. Hulley, at the hearing of the appeal) that the Court *a quo* was correct in rejecting the Applicant's version and in deciding the matter on the State's case; and

7.2 Related to the aforementioned, Mr. Botha was equally forthright in his concession that there is no room for what I would refer to as a defence of putative self-defence on behalf of the Applicant. Such a concession had also been made by Mr. Hulley when he had argued the appeal before us.

8. I turn now to the main thrust of Mr. Botha's argument.

- 8.1 I have dealt in my judgment with the Magistrate's approach on the aspect of the scissors. I remain unpersuaded that there is any merit in this submission, nor do I believe that another Court may take a different view of the matter.

It has never been the State's case that the attack on the complainant had been premeditated, nor has that been the finding of the Magistrate. By drawing inferences the Magistrate had concluded that the Applicant had formed the intent (in the form of *dolus eventualis*) to kill the complainant. Such intent the Magistrate had inferred from the nature of the weapon used, the reckless conduct of the Applicant, the location of the wound considered in conjunction with the medical evidence and the Applicant's failure to furnish an acceptable explanation. It is implied in the Magistrate's judgment that such intent on the part of the Applicant was formed at the time of the incident.

There is, to my mind, no reasonable likelihood of the Supreme Court of Appeal reaching a different conclusion on these aspects.

- 8.2 Mr. Botha has submitted that, given the fact that the complainant had on his own version ducked at the time

of the stabbing, another Court may reasonably find that the Applicant had not intended to kill the complainant, notwithstanding the location of the wound. One must exercise care not to venture into the realm of speculation in order to lay claim to areas of reasonable doubt – such claims on behalf of an accused person must be based on reasonable and solid foundations borne out either by positive evidence or based on reasonable inferences which are consistent with the proved facts;

See: *R v Mlambo* 1957(4) SA 727 (AD) at 738B-C.

When one peruses the record, it is noticeable that this aspect of the ducking of the complainant: -

- a) was elicited in cross-examination of the complainant by Mr. Hulley in the context of a contradiction between that testimony and his earlier testimony at a disciplinary hearing; and
- b) was not probed further at all by Counsel in cross-examination, nor was it advanced by the Applicant in evidence as a possible explanation for the location of the stab wound.

These factors have the effect of leaving this aspect inconclusive, at best for the Applicant. To elevate this aspect as Counsel has attempted to do, would in my opinion necessitate an exercise in speculation.

9 I conclude with this remark: -

As had been conveyed to Counsel during the hearing of the application, we have empathy with the Applicant's unfortunate situation, but we can only assist him insofar as the law permits. I reiterate my introductory remarks in the judgment on appeal – this is a sad, most unfortunate incident which emphasises the need to heal the divisions of the past and to inculcate a spirit of racial tolerance, also in our schools. There are, in my view, no reasonable prospects of success that another Court may come to a finding different than ours and I would dismiss the application for condonation.

S.A MAJIEDT
JUDGE

I concur and it is so ordered.

M.D.J. STEENKAMP
JUDGE PRESIDENT

DATE OF APPLICATION: 20-08-2001
DATE OF JUDGMENT: 24-08-2001
COUNSEL FOR APPELLANT: Mr. M. Botha
COUNSEL FOR RESPONDENT: Mr. C. Nekosie