



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **83/2000**

In the matter between:

MANDLA ARTHUR MSIBI

APPLICANT

and

THE STATE

RESPONDENT

Coram: JP DAFFUE J

Heard: 26 AUGUST 2024

Delivered: 26 AUGUST 2024

ORDER

The following order is made:

1. Condonation is granted to the applicant for lodging his application for leave to appeal outside the prescribed time limit.
2. Leave to appeal to the full bench of this division is granted to the applicant against only the sentences imposed by the honourable judge Beckley on 6 April 2001 under case number 83/2000.

JUDGMENT

Daffue J

Introduction

[1] On 4 April 2001 the applicant and a co-accused were convicted in respect of counts 1, 2 and 3, count 2 being a count of murder. Two days later, on 6 April 2001, he was sentenced to forty years' imprisonment in respect of the count of murder. The trial court ordered that the applicant, as was the case with his co-accused, should serve at least twenty years' imprisonment before they could be considered for parole (the non-parole period). The dates mentioned herein are not typographical errors. These proceedings were finalised more than twenty-three years ago and the presiding judge has long ago completed his active service as a judge.

[2] The applicant applies for leave to appeal to the full bench of this division against the imposition of his sentences, particularly the sentence of forty years' imprisonment. He also filed an application for condonation for lodging his application for leave to appeal outside the prescribed time limit.

[3] The application for leave to appeal was set down for hearing on 26 August 2024 where after it was allocated to me.

Relevant background pertaining to procedural issues

[4] The applicant approached this court under case number 5594/2023, citing the Minister of Justice and Correctional Services and the Director of Public Prosecutions, Bloemfontein (DPP) for an order setting aside the aforesaid non-parole period. The application was not opposed. On 23 November 2023 Loubser J granted an order as requested.

[5] On 19 April 2024 the applicant filed his application for leave to appeal in terms of s 316 of the Criminal Procedure Act (the CPA). Simultaneously therewith he also applied for condonation. A founding affidavit deposed to by the applicant is attached to the condonation application. Annexed to the affidavit is the judgment of Van der Walt J (concurring in by Van der Westhuizen and Webster JJ), dismissing the applicant's appeal in the Gauteng High Court, Pretoria under case number

A930/2000. In that case the trial court sentenced the applicant to sixty years' imprisonment for murder and ordered that he should not be released on parole before the expiry of a period of twenty-five years. It is not certain when the trial court sentenced the applicant for the murder that occurred on 23 October 1993, but sentenced was imposed before the imposition of sentences in this court.

[6] The applicant also attached the judgment on conviction and the sentence imposed upon him by the trial judge in this division. Notwithstanding the fact that Mr Bantjes on behalf of the applicant requested the trial court to order that the sentences to be imposed should run concurrently with the sentence of sixty years served by the applicant in respect of the Gauteng sentence, the trial judge decided not to comply with this request.

[7] Upon perusal of the documents it became clear to me that the applicant had presented flimsy and feeble reasons for condonation. I deemed it necessary to contact both parties through my secretary and directed:

- a. the applicant to file a supplementary affidavit on/or before 17 August 2024, if so advised, to deal with the issues raised in the email of 1 August 2024;
- b. the DPP shall respond to both the founding and the supplementary affidavits in an answering affidavit, if so advised, not later than 23 August 2024;
- c. the parties to file heads of argument, if they so wish.

[8] The applicant did indeed file a supplementary affidavit as well as heads of argument. The DPP did not file an answering affidavit in opposition of the application for condonation, but Mr Pretorius filed heads of argument. The DPP did not oppose the application for condonation in respect of the reasons advanced for the delay.

The application for condonation

[9] The principles applicable to granting of condonation are well-known and will not be set out herein. It is sufficient to state that condonation is not for the taking and the party seeking an indulgence must show sufficient cause. They should also give a full explanation for non-compliance with the rules of court. The explanation must be reasonable for the court to come to the conclusion that the default should be excused.

[10] The interests of justice is an important aspect to be considered, but as stated by Boseilo AJ in *Grootboom v NPA*¹, speaking for the majority, '... the concept "interests of justice" is so elastic that it is not capable of precise definition.' The particular circumstances of each case shall determine which of the well-known factors to be considered in condonation applications are relevant, or should be given more weight than others, to the outcome of a particular application.

[11] The problem often experienced in the event of delays involving appeals is the inability to obtain the transcribed record of the trial court. I have serious doubt if the record will be obtained in this case. I also accept that the trial judge will not be able to assist with any reconstruction of the record. I am personally aware that Mr Bantjes, who appeared for the applicant during the trial, has passed away. Fortunately, the appeal is not directed against the convictions and a detailed judgment has been delivered.

[12] I thought long and hard whether to grant condonation, bearing in mind the monotonous regularity which this court is faced with in about all appeals pertaining to the disregard of the rules of court by litigants and lawyers. So often, a feeble, or no reasonable explanation is given for the default. In order to allow the applicant a further opportunity to present an excuse for the default, I allowed my secretary to forward correspondence to the parties referred to above. I am still not satisfied with the explanation provided, but in light of the interests of justice I am prepared to grant condonation.

Grounds for leave to appeal

[13] The applicant recorded that on 1 March 2024 he had already served 27 years' and six months' imprisonment, excluding the 343 days when he escaped. He relies on a letter received from the Department of Correctional Services in this regard. In terms thereof he will only become eligible for placement on parole on 12 August 2036 after having served 25 days short of 40 years' imprisonment. This will be two months short of his 74 birthday. According to him, the sentence is inhumane, particularly insofar as the trial court did not properly consider the cumulative effect of all the sentences. Therefore, and unless he is successful on appeal, he will serve much longer than prisoners sentenced to life imprisonment.

¹ 2014 (2) SA 68 (CC) para 22.

[14] The DPP has not seriously contended that another court would not reasonably come to a different conclusion than the trial court. In fact, Mr Pretorius conceded that there are reasonable prospects of a successful appeal on sentence. Although more is required than a mere possibility of success, or that the case is arguable and not hopeless, I am satisfied that a sound and rational basis exists to find that there are reasonable prospects of success on appeal.²

[15] I accept that another court would reasonably conclude that the sentence of 40 years' imprisonment is an extremely severe punishment and disproportionate with the seriousness of the offence of murder, also bearing in mind that the trial court did not order that the sentences imposed on the applicant, or a portion thereof, should run concurrently with the sentence imposed in Gauteng.

[16] The applicant is entitled to a reconsideration of the sentences imposed on him and consequently, leave to appeal should be granted.

Order

[17] Consequently, the following order is issued:

1. Condonation is granted to the applicant for lodging his application for leave to appeal outside the prescribed time limit.
2. Leave to appeal to the full bench of this division is granted to the applicant against only the sentences imposed by the honourable judge Beckley on 6 April 2001 under case number 83/2000.


DAFFUE J
JUDGE OF HIGH COURT

Appearances

For appellant:	ADV A SIMPSON
Instructed by:	Mariechen Martins Attorneys Bloemfontein.
For respondent:	ADV D PRETORIUS
Instructed by:	Director of Public Prosecutions Bloemfontein.

² *S v Smith* 2012 (1) SACR 567 (SCA) para 7.