



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

Reportable / Not reportable

Case no: 68/2017

In the matter between

LENKOETSE STEPHEN NTHAKO

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Lenkoetse Stephen Nthako v The State (68/2017)*

Coram: **Mpama AJ**

Heard: This application was determined on the basis of written arguments instead of an oral hearing.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be **16h00 on 06 December 2024.**

Summary: *Application for leave to appeal – condonation - reasonable prospects of success*

ORDER

Condonation for the late filing and prosecution of the application for leave to appeal is refused.

JUDGMENT

Mpama AJ

[1] The applicant seeks leave to appeal against the sentence of Phalatsi AJ, condonation for the late filing and prosecution of the application for leave to appeal (the application).

[2] In his notice of appeal, the applicant appeals only against sentence, however the heads of argument filed on behalf of the applicant and the respondent deal with both conviction and sentence. I propose to deal only with sentence, since the notice of appeal only notes the grounds upon which the trial court's sentence is attacked and is silent on conviction.

[3] On 9 November 2017, the applicant was convicted and sentenced as follows:

- (i) Count 1: housebreaking with intent to assault and assault with intent to do grievous bodily harm – 4 years' imprisonment
- (ii) Count 3: murder in terms of the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 – 23 years' imprisonment and
- (iii) Count 4: arson – 7 years imprisonment.

[4] In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, as amended (the CPA), sentences on counts 1, 2 and 4 were ordered to run concurrently with the sentence on count 3. The effective term of imprisonment amounted to 23 years.

[5] As envisaged in s 316(2)(b) of the CPA, the record of the court's judgment and

sentencing proceedings were placed before me on 29 October 2024. The applicant and respondent filed their heads of argument on 13 and 18 November 2024 respectively. The parties agreed to dispense with the hearing of oral arguments and requested the court to decide the application on the papers. I acceded to the request and accordingly, the application was considered in chambers and on the papers, including the written heads of argument.

[6] From the outset it is necessary to deal with the applicant's condonation application. An application for leave to appeal must be made within 14 days after the imposition of sentence or within an extended period, as the court may, on application and for good cause shown, condone an application that has been filed late.¹ In *Melane v Santam Insurance Co Ltd*² the court said:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon the consideration of all 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 thereof, the prospects of success, and the importance of the case. Ordinarily those factors 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 the strong prospects of success may tend to compensate for a long delay. And the respondent's interest of the in the finality must not be overlooked.'³

[7] In *Grootboom v National Prosecuting Authority*⁴ the Constitutional Court stated that: 'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'⁵

[8] The application for condonation is not opposed by the respondent. The notice of motion is dated 13 August 2024, an affidavit in support of the application for condonation

¹ See s 316(1)(b) of the CPA.

² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

³ *Ibid* at 532C.

⁴ *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC).

⁵ *Ibid* para 23.

was commissioned on 18 October 2023 and the application was filed with the office of the registrar on 23 September 2024. The reasons for the delay have not been dealt with so much comprehension by the applicant in his affidavit. He stated that it has always been his intention to lodge this application and the delay was beyond his control. He did not explain what occasioned the delay, save to mention that 'I should have received a letter after my judgment explaining my rights and I waited for such letter without any success.' What compounds the applicant's explanation is that he does not tell from whom he was supposed to obtain the 'letter', why was the 'letter' not provided at an opportune time and whether he took any measures to obtain the 'letter' when it was clearly not forthcoming. If it has always been his intention to appeal, the suggestion is that he has always known of his rights to appeal and I cannot fathom why a letter would stand in his way. Whether he received the letter or not, and when, is lacking in his affidavit.

[9] In addition, there is no explanation as to what happened between 18 October 2023 when the affidavit was commissioned and 23 September 2024 when the application was filed in the registrar's office. The applicant has failed to give a clear demonstration of why it took him six years and ten months to bring this application or, at the minimum, what occasioned a delay between when his affidavit was signed and the filing of the application in the registrar's office. His explanation does not, at all, account for the inordinate period of the delay. The applicant seeks an indulgence from the court and has a duty to fully explain reasons for the delay.

[10] Nevertheless, this is not the only factor that this court must consider on whether condonation can be granted or not. In addition, a court must consider the prospects of success on appeal. If there exist good prospects of success on appeal, a court must be inclined towards granting condonation in spite of a poor or insufficient explanation for the delay. See *Mntambo v S*⁶ where Weiner AJA held:

'In dealing with this issue, it is useful to refer to the judgment in this Court in *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*, where Ponnar JA stated that:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.

In applications of this sort the prospects of success are in general important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*, it is advisable, where

⁶ *S v Mntambo* [2021] ZASCA 17.

application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success."⁷

[11] Gleaned from the court's judgment, the following facts gave rise to the applicant's conviction: The applicant is the father of the deceased's children. He was still involved in a romantic relationship with the deceased at the time of her demise. The applicant arrived at the deceased's residence, in search of the deceased and Mr Zachariah Muletli Tlhabane, a complainant, on the charges of housebreaking with intent to assault and assault with intent to do grievous bodily harm as well as arson. The applicant suspected that the deceased and Mr Tlhabane, despite them being cousins, were having a romantic affair. The applicant found Mr Tlhabane's sister. He threatened to kill the deceased and Mr Tlhabane if they did not end their relationship. Thereafter, he left the premises.

[12] At night, the applicant returned; this time armed with a panga. He kicked the door of the shack occupied by Mr Tlhabane. When the door opened, he entered the shack and struck Mr Tlhabane with a panga, injuring him on the head and hand. Mr Tlhabane ran to his mother's house (in the same yard). The applicant left Mr Tlhabane's shack, proceeded to where the deceased was, attacked her with a panga as well, and dragged her to the street, accusing her of having a relationship with Mr Tlhabane. The applicant left the injured deceased on the street, went back to the shack and burnt it down. Undeterred, he proceeded to his sister's house which was not far from where the deceased's laid. On arrival, he woke his sister and his 15-year-old child he shared with the deceased. He invited them to come and see that he has killed the deceased. He took them to where the deceased was and left them there.

[13] All these endeavors brought no satisfaction to the applicant as he went to the deceased's parents' residence and invited the deceased's stepfather to 'come and collect his daughter as he had already finished her off'. The applicant took the deceased's stepfather to where the deceased was. The deceased was taken to hospital and later passed on.

[14] The applicant's grounds of appeal are, *inter alia*, that the court a quo failed to consider his personal circumstances and placed too much weight on aggravating circumstances, although it found that there were substantial and compelling circumstances which allowed for deviation from the minimum sentence, as well as that

⁷ Ibid para 3.

the sentence imposed is too harsh and induces a sense of shock.

[15] The applicant was convicted of murder on count 2. The prescribed sentence is life imprisonment. The court found substantial and compelling circumstances, deviated from the prescribed sentence and imposed 23 years imprisonment. On the charge of housebreaking with intent to assault and assault, he was sentenced to four years' imprisonment, and on arson, to seven years' imprisonment. These sentences were ordered to run concurrently with the sentence on the charge of murder.

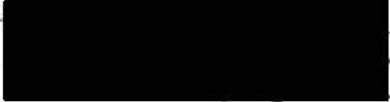
[16] What is aggravating is that the commission of the offences was well-planned. The applicant arrived at the deceased's place during the day and threatened to kill the deceased. The applicant returned in the evening armed with a dangerous weapon. A domestic relationship existed between the applicant and the deceased. After the attack, he dragged the deceased, his lover and the mother of his children and left her injured on the street. He went to fetch his own child so that he can see his mother dying on the street. He also brought the deceased's stepfather to see what he has done. Lastly, the personal circumstances of the applicant were considered by the trial court, hence it deviated from the prescribed sentence. My view is that there are no prospects of success on appeal, the sentence imposed is not harsh or shockingly inappropriate.

[17] The applicant tendered an insufficient explanation for the delay in bringing this application. I have also carefully considered whether there are reasonable prospects of success on appeal and I cannot find any. Therefore, the applicant has failed to show good cause warranting condonation of his late filing of this application.

ORDER

[18] In the premises, I make the following order:

Condonation for the late filing and prosecution of the application for leave to appeal is refused.


MPAMA, AJ

Appearances

For the Applicant: Mr PL Van Der Merwe

Instructed by: Legal Aid SA
Bloemfontein

For the Respondent: Adv M. Strauss

Instructed by: Office of the Director of Public Prosecutions
Bloemfontein